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Preemption as a Consistency Doctrine

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PREEMPTION AS A CONSISTENCY DOCTRINE

Jesse Merriam*

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INTRODUCTION

Suppose I were to give you the following rule: Federal law preempts state law under the Supremacy Clause¹ if, and only if, there is a “logical contradiction”² between the two laws. And now suppose I were to ask you: Would there be preemption if federal law required states to “accept and use” a particular document in registering voters, and a state, as part of accepting and using that voter registration form, required an additional piece of evidence not required by federal law?³ Would it matter if the state required that additional piece of evidence simply to verify a question required on the federal form? How would such a situation compare to the Food and Drug Administration’s (FDA) approval of a prescription-drug label that a state jury later determined to be insufficient as a matter of state tort law in warning users of relevant risks?⁴ Would it matter for purposes of finding a federal-state logical contradiction whether the jury award was based on a theory of negligence or strict liability? Likewise, would the Controlled Substances Act (CSA) prohibition on the use and possession of marijuana⁵ logically contradict a state law permitting the recreational use and possession of marijuana within the state?⁶ Would the nature of this federal-state conflict change if, before the state passed this law, the U.S. Deputy Attorney General had issued a memorandum announcing that the federal government would not be enforcing the CSA as applied to the medical use of marijuana?⁷

¹ U.S. CONST. art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

² This “logical contradiction” test, derived from Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 260 (2000), is one of the proposals to reform preemption doctrine that will be examined most closely in the coming pages.

³ See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. ___, 133 S. Ct. 2247, 2249 (2013).

⁴ Compare *Wyeth v. Levine*, 555 U.S. 555, 558–59 (2009) (holding that FDA approval of drug warnings does not provide a defense for tort claims under state law against non-generic manufacturers), with *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 608–09 (2011) (holding that FDA approval of drug warnings *does* provide a defense for tort claims under state law against generic manufacturers).

⁵ 21 U.S.C. § 872, Schedule I(c)(10) (2012).

⁶ See generally *Nebraska v. Colorado*, 136 S. Ct. 1034, 1035–36 (2016) (Thomas, J., dissenting from denial of motion for leave to file bill of complaint).

⁷ See Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, to U.S. Att’ys (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/UD8U-265S>].

At this point, you might be having an LSAT flashback, with all the horrors of grouping together an orchestra consisting of four different string, three brass, and two woodwind instruments. But these are not mere logic games. These are real cases arising under the Court's preemption doctrine—one of the most frequently litigated, politically divisive, and financially costly areas of constitutional law.⁸

Over the past twenty-five years there has been a spate of scholarship on preemption, but the vast majority of this work has focused on narrow and factually driven questions relating to why preemption should or should not occur in a particular area of the law,⁹ not the more conceptually challenging problem of how to disentangle the mass and welter that we know as preemption law. This is largely because what draws most commentators to the subject of preemption is not the ether of doctrinal niceties, but rather the “meat and drink” of advocacy. That is, to put it more vulgarly, most academic work on the subject seeks either to defend the Plaintiffs' or Defense Bar on particularly controversial areas of litigation.¹⁰ As a result, despite the fact that almost every law review article on preemption begins by describing the “chaos” pervading the doctrine,¹¹ most scholars, advocates, and judges simply accept what Justice Scalia recently described as “[t]he Court's make-it-up-as-you-go-along approach to preemption[.]”¹²

There are, however, two notable exceptions to this complacency: (1) Professor Caleb Nelson, who, more than fifteen years ago, authored one of the most influential

⁸ See *infra* Section I.B.

⁹ See, e.g., Richard A. Epstein, *The Case for Field Preemption of State Laws in Drug Cases*, 103 N.W. U. L. REV. 463, 464–65 (2009) (discussing preemption in the field of medical drugs); David G. Owen, *Federal Preemption of Products Liability Claims*, 55 S.C. L. REV. 411, 412 (2003) (discussing federal preemption in the field of products liability).

¹⁰ FDA preemption of state tort law has incited the most productivity—and division—among commentators. For the anti-preemption side, which is generally associated with progressive politics and commands the majority of academic scholarship, see, e.g., THOMAS O. MCGARITY, *THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES* (2008); PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION (William W. Buzbee ed., 2009); Erwin Chemerinsky, *A Troubling Trend in Preemption Rulings*, TRIAL, May 2008, at 62; Mary J. Davis, *The Battle over Implied Preemption: Products Liability and the FDA*, 48 B.C. L. REV. 1089 (2007); Robert S. Peck, *A Separation-of-Powers Defense of the “Presumption Against Preemption,”* 84 TUL. L. REV. 1185 (2010). For the pro-preemption side, which is generally associated with libertarian or conservative politics, see, e.g., Epstein, *supra* note 9; Victor E. Schwartz & Cary Silverman, *Preemption of State Common Law by Federal Agency Action: Striking the Appropriate Balance that Protects Public Safety*, 84 TUL. L. REV. 1203 (2010); Daniel E. Troy, *The Case for FDA Preemption*, in FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 81 (Richard A. Epstein & Michael S. Greve eds., 2007) [hereinafter FEDERAL PREEMPTION]; Alan Untereiner, *The Defense of Preemption: A View from the Trenches*, 84 TUL. L. REV. 1257 (2010).

¹¹ Owen, *supra* note 9, at 412–13 (listing synonyms of “chaotic” that commentators have used).

¹² *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. ___, 135 S. Ct. 1591, 1603 (2015) (Scalia, J., dissenting).

law review articles on preemption, offering a new understanding of the Supremacy Clause as turning on logical contradictions, and giving rise to Nelson's "logical contradiction" test;¹³ and (2) Professor Stephen Gardbaum, who, in six different works, beginning in 1994, has developed the argument that the Court's preemption doctrine, to the extent it does not deal with consistency between federal and state laws, is not actually derived from the Supremacy Clause but rather from somewhere else in the Constitution.¹⁴ Although there have been other significant works challenging the normative underpinnings of the Court's preemption doctrine,¹⁵ Nelson's and Gardbaum's works are unmatched in their sophistication and influence in reconceptualizing the Court's preemption doctrine in terms of legal consistency.¹⁶

As valuable as their works on preemption are, however, they both share the same flaw: Both scholars gloss over the difficulty of determining what it means for laws to contradict each other, a heretofore ignored point in the commentary on their work.¹⁷ Thus, Nelson's and Gardbaum's theories, though certainly the most promising

¹³ Nelson, *supra* note 2, at 231, 234, 260 (2000).

¹⁴ See, e.g., Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994) [hereinafter Gardbaum, *Nature of Preemption*]; Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996); Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483 (1997); Stephen Gardbaum, *Preemption*, in 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1989 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000); Stephen Gardbaum, *Congress's Power to Preempt the States*, 33 PEPP. L. REV. 39 (2006) [hereinafter Gardbaum, *Congress's Power*]; Stephen Gardbaum, *The Breadth vs. the Depth of Congress's Commerce Power: The Curious History of Preemption During the Lochner Era*, in FEDERAL PREEMPTION, *supra* note 10, at 48 [hereinafter Gardbaum, *Breadth vs. Depth*].

¹⁵ See, e.g., Robert R. Gasaway, *The Problem of Federal Preemption: Reformulating the Black Letter Rules*, 33 PEPP. L. REV. 25 (2005); Robert R. Gasaway & Ashley C. Parrish, *The Problem of Federal Preemption: Toward a Formal Solution*, in FEDERAL PREEMPTION, *supra* note 10, at 219; Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1 (2007); S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685 (1991); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727 (2008); Mark D. Rosen, *Contextualizing Preemption*, 102 NW. U. L. REV. 781 (2008); Ernest A. Young, *Federal Preemption and State Autonomy*, in FEDERAL PREEMPTION, *supra* note 10, at 249.

¹⁶ That both Nelson's and Gardbaum's theories link the Supremacy Clause with legal consistency makes it quite surprising that their works engage each other with only a few fairly dismissive references. See Gardbaum, *Congress's Power*, *supra* note 14, at 44–46, 45 n.26; Nelson, *supra* note 2, at 234 n.32.

¹⁷ Daniel Meltzer's powerful critique of Nelson's test (in what was Professor Meltzer's last article before his untimely passing) comes the closest to addressing this point. But Meltzer does not question whether Nelson's understanding of the test actually tracks the meaning of logical contradictions. Instead, Meltzer questions whether Nelson's test would produce different results from the Court's preemption framework, and whether the test would succeed in constraining judicial discretion. See Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 31 (2013).

of efforts to clarify preemption law, cannot cash out doctrinally until we can agree on what a contradiction means in the preemption context—which, as indicated in this Article’s introductory paragraph, is no easy task.¹⁸

This task is particularly relevant now that Professor Nelson’s former boss, Justice Thomas,¹⁹ has adopted Nelson’s “logical contradiction” test as the best way of applying the original meaning of the Supremacy Clause²⁰—thereby giving rise to what Daniel Meltzer has dubbed the “Nelson/Thomas” test.²¹ Even if the test were to command a majority, however, which will likely turn on who replaces Justice Scalia,²² we might not get more consistency in this area of the law, given that even Justice Thomas, the leading advocate of the test on the Court, has proved to be inconsistent in applying the test—not only in *when* he has applied it, which of course is common in controversial areas of constitutional law, but more problematically, in *how* he has applied it.²³ This is not to fault Justice Thomas: Nelson’s application of the test in his article is inconsistent due to his fuzzy definition of what constitutes a “logical contradiction.” The problem is the test itself—more particularly, its dependency on an ambiguous concept that it fails to define.

My goal in this Article is two-pronged, grounded in both practice and theory. My practical goal is to clarify how the concept of “logical contradictions” can be deployed in preemption law more effectively and predictably, in an effort to help the doctrine fulfill its purpose of creating, as Professor Henry Hart famously wrote in 1954, “a single system of law[.]”²⁴ Hart was well aware of how “difficult it may be on occasion to discern in advance which of two or more conflicting voices really carries authority[.]” but he found this reconciliation of inconsistency to be an essential

¹⁸ Indeed, the standard offered in the introductory paragraph—i.e., that federal law preempts state law if, and only if, there is a logical contradiction between the two laws—is Nelson’s test. See Nelson, *supra* note 2, at 260.

¹⁹ Nelson clerked for Justice Thomas in the 1994–1995 term, raising a very interesting trivia question: How many times has a Justice adopted his or her former clerk’s scholarly proposal to reform an area of law? I am not sure of the answer, but it is a fascinating question about the persuasive authority on the Court that former clerks may later exercise as legal scholars.

²⁰ See *Wyeth v. Levine*, 555 U.S. 555, 590 (2009) (Thomas, J., concurring in the judgment) (citing Nelson, *supra* note 2, at 260–61).

²¹ Meltzer, *supra* note 17, at 32.

²² Just two years after *Wyeth*, Chief Justice Roberts, as well as Justices Scalia and Alito, joined Thomas’s opinion in applying the logical contradiction test to preempt state tort labeling lawsuits against generic drug manufacturers using FDA-approved labels. See *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 607 (2011). Justice Kennedy joined Thomas’s opinion, except for Part III-B-2, *id.*, the section adopting and applying the “logical contradiction” test, *id.* at 621–23 (opinion of Thomas, J.). With Justice Scalia’s recent passing, however, there are currently only three clear votes for the test.

²³ See *infra* notes 302–14 and accompanying text for a discussion of Justice Thomas’s inconsistent application of the test.

²⁴ Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 489 (1954).

task for any legal system, given that “[p]eople repeatedly subjected, like Pavlov’s dogs, to two or more inconsistent sets of directions, without means of resolving the inconsistencies, could not fail in the end to react as the dogs did.”²⁵ My practical goal is to help prevent this “nervous breakdown”²⁶ that Hart identified as threatening our system.

In the process of pursuing this practical goal, I also have an ancillary theoretical agenda, and that is to show how preemption, just like stare decisis, is central to the judiciary’s role in pursuing the rule of law through the doctrine’s promotion of consistency. Although there has been some recognition among judges and scholars of how stare decisis promotes the rule of law by making adjudication more consistent,²⁷ the relationship between preemption and the rule of law has been entirely ignored, even though preemption, just like stare decisis, is designed to make our legal system consistent—that is, to prevent us from becoming Pavlovian dogs, responding arbitrarily to inconsistent commands.

The Article will proceed as follows. Part I will examine the problem underlying the Court’s preemption jurisprudence—the problem of doctrinal incoherence. After Section I.A outlines the four branches of the Court’s preemption analysis, Section I.B will trace how the Court has developed these four branches. In tracing this development, Section I.B will draw heavily from Stephen Gardbaum’s chronology of the Court’s preemption jurisprudence, but will depart from Gardbaum’s tripartite chronology to carve the Court’s jurisprudence into five distinct periods.²⁸ Through this analysis, Section I.B will demonstrate that although each of the first four periods represented a coherent, though arguably flawed, view of the Supremacy Clause, the fifth period, in which the Court consolidated the previous four periods into its current four-part doctrine, is incoherent in the literal sense of that word.

Section I.B.5.a, in exploring this fifth period, will focus on how the Roberts Court has adjudicated preemption cases. This Section will conduct an original empirical overview of the twenty-eight preemption cases that the Roberts Court has decided over its first eleven years. This empirical overview will analyze the rate at which the Roberts Court has ruled in favor of preemption—broken up by the voting of the individual Justices (Section I.B.5.a.i), case subject-matter (Section I.B.5.a.ii),

²⁵ *Id.*

²⁶ *Id.*

²⁷ *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992); *Payne v. Tennessee*, 501 U.S. 808, 849 (1991) (Marshall, J., dissenting); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004); *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 479 (1987); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 420 (1983), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); Lewis F. Powell, *Stare Decisis and Judicial Restraint*, 62 N.Y. STATE BAR J. 15, 18 (1991); Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 581 (1989).

²⁸ *See* Gardbaum, *Nature of Preemption*, *supra* note 14, at 785–805.

and preemption branch (Section I.B.5.a.iii). After demonstrating that some subjects and branches have a much stronger relationship than others to division within the Supreme Court, this discussion will conclude that, although it is unclear whether the Court's division is the cause or result of doctrinal incoherence, it is nonetheless clear that creating a more coherent preemption doctrine will promote the rule of law by limiting the financial costs and adjudicative unpredictability associated with preemption litigation.

Part II will examine proposed solutions to this rule-of-law problem, dividing these solutions into formalist and functionalist approaches. Professors Nelson and Gardbaum have proposed the leading formalist solutions in seeking to reconceptualize preemption doctrine to turn only on the formal or logical relationship between the normative content embodied in the federal and state laws.²⁹ Professor Dan Meltzer, before his untimely passing, provided what I believe to be the most powerful functionalist criticism, focusing in particular on what he dubs the "Nelson/Thomas" test.³⁰ For Meltzer, preemption analysis cannot rest on formal categories, such as an abstract notion of logical contradictions.³¹ Rather, as a form of statutory interpretation, preemption requires courts to make factually sensitive inquiries into whether the state law would undermine or interfere with the purpose and functioning of the particular federal law at issue.³² Part II will conclude with a discussion of why, given functionalism's relationship with the doctrinal incoherence and preemption politics discussed in Section I.B.5, a formalist rather than a functionalist approach is better suited to clarifying preemption doctrine and thereby promoting the rule of law.

Part III will then take a turn to advance my own formalist solution, which will incorporate many of the elements of the approaches discussed in Part II. In developing my proposal, Section III.A will take a step back and consider preemption as part of a broader set of legal doctrines designed to establish legal consistency—what I call "consistency doctrines." Section III.B will then consider how the Court has *conceptualized* the *meaning* of legal consistency through its various consistency doctrines. After demonstrating how the Court has generally employed a *normative* conception of consistency, whereby courts look to whether the conflicting normative content pulls an agent in opposing doctrines, Section III.C will ground this normative consistency in formal logic, focusing in particular on the deontic logic theorem forbidding normative systems from requiring and forbidding an agent to perform the same action. Section III.D will then apply this normative consistency to preemption law to derive the following rule: Federal law should displace state law under the Supremacy Clause if, and only if, the normative terms of the two laws impose conflicting obligations on the subjects of those laws, either through conflicting prohibitions, requirements, or rights.

²⁹ See *infra* Section II.A.

³⁰ Meltzer, *supra* note 17, at 32.

³¹ *Id.* at 33–34.

³² *Id.* at 34.

Part IV will wrap up the discussion by distinguishing my proposed “normative consistency” test from Gardbaum’s “supremacy” approach, Nelson’s “logical contradiction” test, and the Court’s “direct conflict” analysis. To illustrate how my test is similar to, but distinct from, these various approaches, Part IV will apply my test to several contemporary problems plaguing preemption law, focusing in particular on one of the most controversial areas—FDA preemption. The Article will thus come full circle to answer some of the questions posed in its first paragraph. Finally, the Article will conclude with some reflection on what lessons the preceding discussion offers for understanding the rule of law and the nature of consistency within our legal system.

I. THE PROBLEM: DOCTRINAL CHAOS

Let us start with some preemption basics. The Court has derived its preemption doctrine from the Supremacy Clause in Article VI,³³ providing that:

[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.³⁴

From this language, the Court has developed a four-part preemption framework—consisting of express, field, impossibility, and obstacle preemption.³⁵

A. The Four Branches of the Preemption Tree

These four branches stem from the two primary branches of preemption—express and implied preemption.³⁶ Under express preemption, federal law displaces state law if federal law *explicitly* says that, for a given set of facts, federal and not state law governs the controversy.³⁷ Under implied preemption, federal law displaces state law not expressly through its text, but *implicitly* through the structure or purpose of the federal regulation at issue.³⁸ There are two types of implied preemption: field

³³ See *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992) (plurality opinion) (explaining that it is “under the Supremacy Clause, from which our pre-emption doctrine is derived”).

³⁴ U.S. CONST. art. VI, cl. 2.

³⁵ See *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

³⁶ *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000).

³⁷ See, e.g., *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992).

³⁸ Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149, 1210 (1998).

and conflict preemption.³⁹ Field preemption arises when the intent or effect of federal law is to occupy the entire field in an area of law, so as to leave no room for any state regulation in that area.⁴⁰ Conflict preemption arises, of course, when federal law conflicts with state law, but the Court has broken conflict preemption into two parts—direct conflict preemption (also known as “impossibility preemption”)⁴¹ and indirect conflict preemption (also known as “obstacle preemption”).⁴² Whereas impossibility preemption arises when compliance with both federal and state law would be actually impossible,⁴³ obstacle preemption arises when state law would pose some sort of an obstacle to a federal law’s purpose or objectives, despite the possibility of a subject complying with both laws.⁴⁴ The Court’s preemption framework thus consists of two primary categories, express and implied preemption, but with four distinct tests or branches falling within those two principal categories.

B. The Path to the Four Branches

In developing these four preemption branches from the Supremacy Clause, the Court has taken a slow and circuitous path, with cases lurching and veering in different directions, oftentimes without employing clearly defined jurisprudential terms or categories. Indeed, the term “preemption” did not become part of our constitutional nomenclature until 1917, when Justice Louis Brandeis used the term in his dissenting opinion in *New York Central Railroad v. Winfield*.⁴⁵ From its start, preemption law was messy, with the very name being a misnomer, clumsily appropriated from the

³⁹ Nelson, *supra* note 2, at 226.

⁴⁰ See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

⁴¹ *Wyeth v. Levine*, 555 U.S. 555, 589–90 (2009) (Thomas, J., concurring in the judgment). Throughout the Article, I will use the terms “direct conflict preemption” and “impossibility preemption” interchangeably.

⁴² See Nelson, *supra* note 2, at 228–29 (explaining that obstacle preemption occurs where state law hinders the purposes of federal law, rather than its explicit mandates). Throughout the Article, I will use the terms “indirect conflict preemption” and “obstacle preemption” interchangeably.

⁴³ See, e.g., *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

⁴⁴ See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (holding a state law preempted because it stood “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”).

⁴⁵ 244 U.S. 147, 169 (1917) (Brandeis, J., dissenting) (arguing that the majority had erred in concluding “that Congress has, by legislating on one branch of a subject relative to interstate commerce, *preempted* the whole field” (emphasis added)). Justice Brandeis was dissenting from the majority’s conclusion that the Federal Employer Liability Act, which subjected private railroads to liability for employment accidents, superseded, or “preempted” in Justice Brandeis’s words, the New York Workmen’s Compensation Act—which provided compensation for employment accidents, including those arising from work on railroads, without requiring proof of negligence. *Id.* at 154.

property law doctrine giving ownership of unoccupied land to its first developers.⁴⁶ Preemption law has become only messier since its christening, as the Court has added new doctrines on top of one another, without much attention to how these doctrines relate to one another conceptually.

Although in form the four branches of preemption appear to be analytically discrete categories, in practice they often overlap. As Justice Blackmun put it in *English v. General Electric Co.*,⁴⁷ the categories are not “rigidly distinct.”⁴⁸ Moreover, not only are the categories not rigidly distinct, but there is also significant disagreement over the implications of this overlap. Consider, for example, how Justice Blackmun, to support his claim in *English* that the categories are not “rigidly distinct,” pointed to how field preemption is a species of conflict preemption.⁴⁹ Blackmun seems to have committed a logical error, however, in making this claim: conflict preemption (including both the impossibility and obstacle branches) appears to be a species of field preemption, rather than the other way around, because field preemption seems to be the broader category, in that it excludes *all* state laws that overlap with federal law, not just those that pose impossibility and obstacle conflicts. This error is particularly significant because, as we will discuss below, *English* is the canonical modern preemption case, in assembling the various tests accumulated over two hundred years of preemption jurisprudence into a single doctrinal framework.

We see this confusion exacerbated two years later in another significant preemption case, *Gade v. National Solid Wastes Management Ass’n*.⁵⁰ In *Gade*, the plurality, after using obstacle preemption to rule that OSHA regulations preempted Illinois’s

⁴⁶ To preempt something means, literally, to purchase something before another person does—it is the first option to buy. Richard A. Epstein & Michael S. Greve, *Introduction to FEDERAL PREEMPTION*, *supra* note 10, at 1. The term has been extended to non-financial contexts to mean to take anticipatory action. Hence, a “preemptive strike” is to wage a military assault before one’s opponent gets the opportunity to do so. Preemption, as applied to property law, *did* bear this temporal meaning: It represented a squatter’s right to establish property ownership in anticipation of future settlement. *See, e.g.*, Preemption Act of 1841, ch. 16, 5 Stat. 453 (1841) (repealed 1891). For example, the Preemption Act of 1841 sought “to grant pre-emption rights” to individuals who were already living on federal property. *Id.* But Justice Brandeis applied this temporally laden term to a concept that has no temporal meaning. *Winfield*, 244 U.S. at 169. That is, Brandeis’s use of the term would suggest that preemption is a doctrine about the federal and state governments racing to regulate new areas of conduct, with the Supremacy Clause favoring, as the Preemption Act did, whoever gets to that frontier first. The Supremacy Clause of course bears no such temporality. Federal law nullifies *contrary* state law, no matter which law came first.

⁴⁷ 496 U.S. 72 (1990).

⁴⁸ *Id.* at 79 n.5.

⁴⁹ Indeed, after conceding that these categories are not rigidly distinct, Justice Blackmun observed in the next sentence how “field pre-emption may be understood as a species of conflict pre-emption” because “[a] state law that falls within a pre-empted field conflicts with Congress’ intent (either express or plainly implied) to exclude state regulation.” *Id.*

⁵⁰ 505 U.S. 88 (1992) (plurality opinion).

licensing of hazardous waste equipment operators,⁵¹ cited Justice Blackmun's argument in *English* for the proposition that the plurality could have relied "as easily" on field preemption for this conclusion.⁵² The plurality thus seemed to interpret Justice Blackmun's argument in *English* to mean that obstacle preemption cases necessarily involve field preemption, despite the fact that Blackmun had stated—pardon the pun—in plain English the opposing proposition: that field preemption necessarily involves conflict preemption.⁵³ Further confusing matters, the *Gade* plurality acknowledged that it largely agreed with Justice Kennedy's concurrence in the judgment, where he argued that express preemption was a more appropriate vehicle for finding OSHA preemption.⁵⁴ The *English* and *Gade* opinions illustrate the confusion underlying modern preemption jurisprudence—namely, how it involves overlapping branches, forming what Stephen Gardbaum terms a "hydra-like monster."⁵⁵

In terms of Greek mythology, however, the doctrine may be more like Proteus, Homer's amorphous sea god, than the Hydra of Lerna, in that the Court's preemption framework is not simply a multi-headed doctrine, but one that, like Proteus, assumes different shapes and forms, evading accountability in the process.⁵⁶ Below, we will draw from Gardbaum's work tracing the creation of this hydra-like monster to three distinct jurisprudential periods.⁵⁷ But in keeping with the notion that the

⁵¹ *Id.* at 96–104.

⁵² *Id.* at 104 n.2 ("Although we have chosen to use the term 'conflict' pre-emption, we could as easily have stated that the promulgation of a federal safety and health standard 'pre-empts the field' for any nonapproved state law regulating the same safety and health issue.").

⁵³ *English*, 496 U.S. at 79 n.5 ("[F]ield pre-emption may be understood as a species of conflict pre-emption[.]"). Indeed, if Blackmun was right in *English* about field preemption being a subset of conflict preemption, that would mean that whenever there is field preemption, there would necessarily be conflict preemption, but it would not mean that whenever there is conflict preemption (as the plurality argued there was in *Gade*), there would necessarily be field preemption.

⁵⁴ Indeed, although the plurality was "persuaded" by Justice Kennedy's argument "that the text of the Act provides the strongest indication" that the case should have been decided on the basis of "express preemption," *Gade*, 505 U.S. at 104 n.2, and although the plurality agreed with Justice Kennedy that "Congress intended the promulgation of a federal safety and health standard to pre-empt all nonapproved state regulation of the same issue," the plurality ultimately decided that it "prefer[red] to place this case in the category of implied pre-emption[.]" *id.*

⁵⁵ Gardbaum, *Congress's Power*, *supra* note 14, at 45.

⁵⁶ Of course, according to folklore, Proteus would yield the truth to anyone skilled enough to see past his many forms and grab a hold of him. Menelaus eventually succeeded in grasping Proteus, who, after transforming into various entities, finally relented and guided Menelaus back to his wife Helen. My hope in this Article is that we will similarly be able to take a hold of this protean doctrine, so that we too can be guided back to its purpose of promoting legal consistency.

⁵⁷ Gardbaum divides preemption into three periods: 1789–1912 (under which federal law was "supreme" and therefore displaced any conflicting state laws), 1912–1933 (under which federal law automatically displaced all state laws occupying the same area or field of

doctrine is more protean than hydra-like, we will complicate Gardbaum's relatively clean, tripartite account.

We will do this in two ways. One, we will divide the Court's preemption jurisprudence into *five* periods. Two, we will highlight how instead of replacing the doctrine from the preceding period with a new doctrine, each period has made preemption more and more muddled by heaping overlapping doctrines on top of those prevailing in previous periods—ultimately creating a preemption framework that is always susceptible to transformation and adaptation, eluding whoever seeks to grasp it.

1. The Conflict Period: 1789–1912

Under the first preemption period, covering 1789 to 1912, federal laws displaced state laws, automatically and necessarily, to the extent that the federal and state laws *conflicted* with one another. This period most closely resembles what we now know as impossibility preemption. Indeed, during this period, the Court used the following language about the need to find an inconsistency between federal and state law to nullify state law under either the Supremacy Clause or the dormant component of the Commerce Clause⁵⁸: the state law must “stand in [the] way” of federal law;⁵⁹ present a “collision”⁶⁰ or “a direct inconsistency”⁶¹ with federal law; pose a

regulation), and 1933–present day (under which federal law displaces state law according to congressional discretion). Gardbaum, *Nature of Preemption*, *supra* note 14, at 265–71.

⁵⁸ During this period, the Court oscillated between using the Supremacy Clause and the Dormant Commerce Clause to invalidate state laws that conflicted with federal laws. *See generally* Viet D. Dinh, *Federal Displacement of State Law: The Nineteenth-Century View*, in FEDERAL PREEMPTION, *supra* note 10, at 27.

⁵⁹ *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 199–202, 236–37 (1796) (finding a conflict between (1) a 1777 Virginia law, passed under then-Governor Thomas Jefferson, sequestering British property to raise money for the Revolutionary War, and (2) the 1783 Treaty of Paris, which, in ending the Revolutionary War, gave British creditors the right to recover from American debtors—on the ground that “laws of any State, contrary to [a] treaty, [must be declared] void[,]” for “[a] treaty cannot be the *Supreme law* of the land, that is of all the *United States*, if any act of a *State Legislature* can stand in its way”).

⁶⁰ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 9, 28, 210 (1824) (finding a conflict between (1) an 1808 New York law, giving one party an exclusive license to operate a ferry on the Hudson River from New York City to Elizabethtown Point, New Jersey, and (2) the Federal Navigation Act of 1793, providing that licensed ships “shall be . . . entitled to the privileges of ships or vessels employed in the coasting trade”—on the ground that the 1808 New York license created a “collision with an act of Congress, and deprived a citizen of a right to which that act entitles him”).

⁶¹ *Thurlow v. Massachusetts (The License Cases)*, 46 U.S. (5 How.) 504, 618–20 (1847) (Woodbury, J., concurring) (finding no conflict between (1) state restrictions of alcohol sales, and (2) federal alcohol importation laws—on the ground that, according to Justice Levi Woodbury, “[t]here must be an actual collision, a direct inconsistency, and that deprecated case of ‘clashing sovereignties,’ in order to demand the judicial interference of this court to

“direct and positive [conflict with federal law], so that the two acts could not be reconciled or consistently stand together”;⁶² or pose such an inconsistency that it would have “the effect of destroying the right of the State to act on the subject.”⁶³ Although the Court did find preemption in some of these cases where there was arguably not such a direct conflict between federal and state laws,⁶⁴ the Court consistently represented its case law as warranting displacement of state law only if there was not simply a *difference* but an actual *inconsistency* between federal and state laws—meaning that under this standard “non-conflicting state laws [were] immune from federal displacement.”⁶⁵

A pivotal case during this period, signaling its end and the beginning of the second period, was *Reid v. Colorado*,⁶⁶ which involved whether the federal Animal Industry Act, regulating the interstate transportation of livestock, trumped an 1885 Colorado statute, prohibiting the importation into the state of cattle or horses with an infectious or contagious disease.⁶⁷ At one point, the Court seemed to rest its analysis on a field

reconcile them” (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 487 (1819), *overruled in part by Leisy v. Hardin*, 135 U.S. 100 (1890)).

⁶² *Sinnot v. Davenport*, 63 U.S. (22 How.) 227, 238–39, 243 (1859) (finding a conflict between (1) Alabama requirements that vessels in its state waters file a statement identifying each vessel and its owners, and (2) the overlapping requirements in the Federal Navigation Act of 1793—on the ground that “the repugnance or conflict [is] direct and positive, so that the two acts could not be reconciled or consistently stand together”); *see also Mo., Kan. & Tex. Ry. Co. v. Haber*, 169 U.S. 613, 616–20, 623, 638–39 (1898) (finding no conflict between (1) a Kansas law creating a cause of action against carriers who bring infected cattle into the state, and (2) the Animal Industry Act, regulating the interstate transportation of livestock—on the ground that it is “the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together” (citing *Davenport*, 63 U.S. (22 How.) at 243)).

⁶³ *Asbell v. Kansas*, 209 U.S. 251, 253–58 (1908) (finding no conflict between (1) a Kansas law criminalizing the bringing of cattle into the state that had not been properly inspected under federal law, and (2) the National Bureau of Animal Industry, requiring such inspection—on the ground that federal authority over inspection did not have “the effect of destroying the right of the State to act on the subject”).

⁶⁴ Indeed, *Davenport*—which provided the paradigmatic “direct conflict” language that courts should not find preemption unless the inconsistency is “direct and positive, so that the two acts could not be reconciled or consistently stand together”—invalidated a state law that provided requirements that simply overlapped with federal law. 63 U.S. (22 How.) at 236, 238–40, 243. As Professor Viet Dinh writes, “with *Davenport*, redundancy became a ground for conflict.” Dinh, *supra* note 58, at 27, 32.

⁶⁵ Gardbaum, *Congress’s Power*, *supra* note 14, at 47.

⁶⁶ 187 U.S. 137 (1902).

⁶⁷ *Id.* at 142 (declaring the issue as whether “the subject of the transportation of cattle from one State to another has been so far covered by the act of Congress known as the Animal Industry Act”).

preemption analysis,⁶⁸ but just a couple of pages later in the opinion, the Court, quoting the landmark *Sinnott v. Davenport*⁶⁹ decision, switched to a direct conflict preemption analysis, the prevailing standard at the time.⁷⁰ Ultimately, however, the Court found that there was no preemption because the Colorado law “[did] not cover the same ground as the act of Congress and therefore [was] not inconsistent with that act[.]”⁷¹

The *Reid* Court’s reasoning is notable because of what it suggests about the relationship between consistency and redundancy: the Court held that the state law was permissible because it was consistent with federal law, but it was consistent with federal law because it did not overlap with federal law.⁷² The Court thus upheld the prevailing rule of this period that content consistency is the principal Supremacy Clause criterion, but in doing so, the Court made *content redundancy* the criterion for content consistency—thus intimating, but not completing, the transition into the second period. In this second period, what we will call “the jurisdictional period,” the Court was more explicit in holding that formal inconsistency was no longer a necessary condition for the displacement of state law under the Supremacy Clause.

2. The Jurisdictional Period: 1912–1933

Ten years after *Reid*, in *Southern Railway Co. v. Reid*,⁷³ the Court completed this transition from the conflict to the jurisdictional period by invalidating a North Carolina law requiring common carriers to receive freight and quickly transport it as soon as received to interstate points⁷⁴ on the ground that the North Carolina law touched the field occupied by the Interstate Commerce Commission.⁷⁵ The Court

⁶⁸ *Id.* at 146–47.

[W]hen the entire subject of the transportation of live stock from one State to another is taken under direct national supervision and a system devised by which diseased stock may be excluded from interstate commerce, all local or State regulations in respect of such matters and covering the same ground will cease to have any force, whether formally abrogated or not[.]

Id.

⁶⁹ 63 U.S. (22 How.) 227 (1859).

⁷⁰ *Reid*, 187 U.S. at 148.

This court has said—and the principle has been often reaffirmed—that “in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.”

Id. (quoting *Davenport*, 63 U.S. (22 How.) at 243).

⁷¹ *Id.* at 150.

⁷² *Id.*

⁷³ 222 U.S. 424 (1912).

⁷⁴ *Id.* at 425.

⁷⁵ *Id.* at 442.

rested its reasoning entirely on a content redundancy analysis,⁷⁶ ignoring the content consistency reasoning that had appeared, though somewhat meekly, in *Reid*. Indeed, in *Southern Railway*, it did not matter that the Commission had not acted in a way that might potentially conflict with the North Carolina law.⁷⁷ All that mattered was that the Commission had the *authority* to act in the field of interstate railroad transportation, rendering any state law in that field redundant and therefore impermissible.⁷⁸

Southern Railway thus began a new period, whereby the federal and state government shared concurrent powers, but state authority within a field automatically and necessarily ceased once the federal government entered the area—like patrons scattering from an old western tavern after the fastest gunslinger makes his entrance. Gardbaum dubs the state’s authority that of the “first mover,” in that the states have the power to move into a regulatory field first, but are then displaced once the federal government enters the field of regulation.⁷⁹ We might likewise call the federal government’s power the “gunslinger authority,” in that the federal government’s entrance in a field entirely displaces the state’s presence.

This transition seemed to supplant, rather than add to, the Court’s conflict preemption doctrine, because, as mentioned above, whenever there is a conflict between the content of federal and state law, the two laws necessarily occupy the same field of regulation, thus requiring displacement under this new jurisdictional conception of preemption. We should emphasize that the Court was far from clear on the precise nature of this transition, as the Court continued to use conflict language in the second period,⁸⁰ but there was nonetheless a significant shift away from a conflict conception (whereby the focus was on whether the terms of federal and state law might collide with another) and toward a jurisdictional conception (whereby the focus was on whether the fields of federal and state regulation overlapped with one another).⁸¹ Just as conflict preemption language bled into the second period, the Court also flirted during this jurisdictional period with the notion that congressional intent is the touchstone for preemption analysis,⁸² but the Court did not fully endorse

⁷⁶ *See id.* at 437 (asserting that the issue was whether federal law had “take[n] control of the subject-matter”).

⁷⁷ *See id.* (“There is no contention that the Commission has acted, so we must look to the act.”).

⁷⁸ *Id.* (“Does [the act of Congress], as contended by plaintiff in error, take control of the subject-matter and impose affirmative duties upon the carriers which the State cannot even supplement? In other words, has Congress taken possession of the field?”).

⁷⁹ Gardbaum, *Congress’s Power*, *supra* note 14, at 48.

⁸⁰ *See, e.g., McDermott v. Wisconsin*, 228 U.S. 115, 117 (1913) (“Congressional regulation does not exclude state regulation except so far as the former, lawfully exercised, conflicts with the latter.”).

⁸¹ *See, e.g., Southern Railway*, 222 U.S. at 437.

⁸² *See, e.g., Savage v. Jones*, 225 U.S. 501, 533 (1912) (finding no conflict between (1) an Indiana statute requiring a label disclosing the ingredients of commercial animal food, and (2) the federal Pure Food and Drugs Act of 1906 prohibiting misbranding but not requiring

this view until *Mintz v. Baldwin*,⁸³ which initiated what we will call “the discretionary period.”

3. The Discretionary Period: 1933–1941

Mintz involved whether Congress’s 1903 Cattle Contagious Diseases Act displaced New York’s authority to apply its own inspection requirements to incoming cattle that had “not [been] inspected by, and no certificate [had been] issued under, federal authority.”⁸⁴ Under the gunslinger authority, Congress’s enactment of the Cattle Contagious Diseases Act, by itself, should have eliminated New York’s power to subject entering cattle to its own inspection laws. That is, the state’s power should have automatically and entirely dissipated upon enactment of the federal law. Departing from this standard, however, the Court held that jurisdictional displacement did not operate automatically and necessarily, but rather optionally and contingently according to congressional intent: “The intention . . . to [preempt state law] must definitely and clearly appear.”⁸⁵ And because that intent was not clearly expressed in the Act, the *Mintz* Court found no preemption.⁸⁶

Mintz thus meant that Congress could negate or affirm displacement of state law simply through its expressed intent. Like the previous jurisdictional period, this new discretionary approach seemed to supplant, rather than add to, the Court’s previous doctrines, because if preemption operates according to congressional intent, then the entire analysis should turn on what the federal statute says, not the relationship of the normative content inhering in the federal and state laws. For example, if the statute says that Congress does not have exclusive power over the field, then under the *Mintz* reasoning the overlapping coverage should not warrant displacement of state law.⁸⁷ But if the statute says it does, then under *Mintz* that should end the

publication of ingredients—because “such intent [to supersede state authority] is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State”).

⁸³ 289 U.S. 346, 350 (1933).

⁸⁴ *Id.* at 351.

⁸⁵ *Id.* at 350.

⁸⁶ Specifically, by interpreting Congress’s intent in the Cattle Contagious Diseases Act to provide that “[t]he express exclusion of state inspection extends only to cases where federal inspection has been made and certificate issued[.]” the Court was able to conclude that, because the particular cattle at issue in *Mintz* had not been subject to such federal inspection, Congress must have intended to preserve New York’s authority to subject these cattle to its own laws. *Id.* at 350–51. Note how we see in this reasoning the beginning of the presumption against preemption—which was not formally incorporated into preemption doctrine until fourteen years later in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Once intent became the touchstone of the inquiry, the matter of how to divine intent from federal enactments became central to preemption controversies, thus giving rise to the ongoing debate over whether this intent approach warrants the *Rice* presumption against preemption. See, e.g., Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2092 (2000) (arguing against a presumption for or against preemption).

⁸⁷ The Court has suggested that this discretionary approach means that Congress can, through its expressed intent, *negate* the displacement of state law, even when there is an

inquiry—not because the state law is normatively or jurisdictionally inconsistent with the federal law, but simply because Congress has forbidden any state regulation in that area. Under this discretionary approach, preemption becomes an exercise in interpreting the federal statute, not one of discerning the normative or jurisdictional relationship between federal and state laws.⁸⁸

In the fourth period, the Court continued its progression toward finding preemption to be optional and contingent, according to congressional intent, but the Court added a more functional focus to this inquiry, finding preemption if the state law would undermine the purpose of the federal law, even if Congress had not expressly stated this objective.

4. The Functional Period: 1941–1990

Although a functional approach to federal-state conflicts had animated many of the Court's preemption decisions, dating back to *McCulloch v. Maryland*,⁸⁹ the Court did not fully endorse a functional approach until *Hines v. Davidowitz*,⁹⁰ a case arising from Pennsylvania requiring stricter alienage registration than was required under federal law.⁹¹ The *Hines* Court began its opinion with a field coverage analysis,⁹² but several pages later the Court acknowledged that its preemption precedents

apparent direct conflict between federal and state law. *Cf.* *Midlantic Nat'l Bank v. N.J. Dep't of Env'tl. Prot.*, 474 U.S. 494, 506–07 (1986) (holding that there was no preemption of a state law forbidding abandonment of contaminated land on which toxic wastes had been dumped, despite a federal bankruptcy law expressly permitting such abandonment in some circumstances, because there was no legislative history in federal bankruptcy code indicating Congress's intent to preempt important state environmental laws).

⁸⁸ See *Mintz*, 289 U.S. at 350 (“The purpose of Congress to supersede or exclude state action . . . is not lightly to be inferred. The intention so to do must definitely and clearly appear.”).

⁸⁹ 17 U.S. (4 Wheat.) 316, 330 (1819). We should flag here that *McCulloch* is a landmine for preemption scholarship and case law. It can be read to justify an expansive view of preemption—an interpretation that those supporting a functional approach support. It also may be read, more persuasively in my opinion, not as a preemption case at all, but rather as turning on intergovernmental immunities (i.e., as holding Maryland's taxation of the Bank invalid not because of the supremacy of federal law but because of the immunity of federal institutions from state regulation). See *infra* notes 254–63 and accompanying text.

⁹⁰ 312 U.S. 52 (1941).

⁹¹ Whereas the Pennsylvania Alien Registration Act required aliens to register annually with the state, to carry a state-issued alien identification card, and to pay a \$1 annual registration fee, the federal Alien Registration Act, passed the year after the Pennsylvania law, required aliens only to register one time with the federal government and did not require an identification card. *Id.* at 59–61.

⁹² *Id.* at 62–63.

First. That the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution [means that] . . . [w]hen the national government by treaty or statute has established rules and

had employed several terms requiring an actual inconsistency between federal and state law.⁹³ Here, the Court was of course referring to the tension between the first and second periods discussed above. The Court then explained that it found both of these periods unsatisfactory, because they applied “an infallible constitutional test or an exclusive constitutional yardstick . . . [to an area of law where] there can be no one crystal clear distinctly marked formula.”⁹⁴ The Court then announced a new test that would be more malleable and open-ended in accounting for case-specific factors. Under this new test, the Court’s “primary function is to determine whether, under the circumstances of this particular case, Pennsylvania’s law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁹⁵

The Court did not rely here on Congress’s stated intent, which is what seems to have been required under the *Mintz* reasoning.⁹⁶ Indeed, the Court did not inquire at all into whether Congress intended to displace the Pennsylvania law. Rather, the only question for the *Hines* Court was whether the Pennsylvania law would have undermined the Court’s determination of the purpose of the federal law.⁹⁷ As a result, even if Congress had specifically expressed that it intended not to displace state law, the Court would still need to rule in favor of preemption if the Court found that the state

regulations touching the rights, privileges, obligations or burdens of aliens as such, . . . [n]o state can add to or take from the force and effect of such treaty or statute[.]

Id.

⁹³ In Justice Black’s words, the Court had “made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference.” *Id.* at 67.

⁹⁴ *Id.* The irony that the absolutist, textualist Justice Black wrote these words should not be lost on the reader. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965) (Black, J., dissenting) (“First Amendment freedoms, for example, have suffered from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used.”). Adding to the irony, then-Justice Stone, who was of course a legal realist in many ways, took a more formalistic approach in dissent, claiming that there is a

long established principle of constitutional interpretation that an exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so “direct and positive” that the two acts cannot “be fairly reconciled or consistently stand together,”

Hines, 312 U.S. at 80 (Stone, J., dissenting) (quoting *Sinnot v. Davenport*, 63 U.S. (5 How.) 227, 243 (1859)). Justice Stone thus concluded that the Court should have upheld the Pennsylvania law here because “compliance with the state law does not preclude or even interfere with compliance with the act of Congress.” *Id.* at 81. That Justice Black would support a functional approach to preemption—and Justice Stone a formal one—is just one of the many jurisprudential oddities wrought by preemption. *See supra* notes 11–12 and accompanying text.

⁹⁵ *Hines*, 312 U.S. at 67.

⁹⁶ *See* 289 U.S. 346, 350 (1933).

⁹⁷ *Hines*, 312 U.S. at 67.

law in question stood as an obstacle to Congress's evident purpose and objective in enacting it.⁹⁸

The *Hines* Court thus seemed to wrap the previous periods of preemption together so as to form a new, all-encompassing, functionalist category—one that essentially comes down to a judicial determination. Once again, the Court's previous doctrines were replaced by, or at least assimilated into, the Court's new way of dealing with preemption—an interpretation of *Hines* affirmed in such significant later cases as *Rice v. Santa Fe Elevator Corp.*⁹⁹ and *Florida Lime & Avocado Growers v. Paul*.¹⁰⁰ It was not until 1990 that the Court formally and completely consolidated these various conceptions of preemption into a single doctrinal framework.

5. The Consolidation Period: 1990–Present

Before 1990, there were efforts to consolidate the Court's various tests,¹⁰¹ but, as mentioned above,¹⁰² it was not until *English v. General Electric Co.* that a majority of the Court fully articulated the four-part test that we now know as preemption doctrine. This represented a substantial reconceptualization of preemption.¹⁰³ As discussed

⁹⁸ Indeed, the Court has since interpreted *Hines* to mean that it is the Court's duty to apply an obstacle preemption analysis even if Congress has specifically limited the preemptive effect of the federal statute to impossibility preemption. See *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281–84 (1987).

⁹⁹ 331 U.S. 218 (1947). The *Rice* opinion is arguably the first to synthesize the express, field, and conflict branches of the preemption tree, but the Court's reasoning did not treat these as *independent prongs*, but rather *interdependent factors* in the overriding functional question of how the state law relates to the Court's determination of the purpose of the federal law. See *id.* at 230–31. That is, statutory language, field coverage, and content inconsistency were all relevant to the Court's analysis, but only to the extent that they relate to whether the state law would undermine the purpose of the federal law. See *id.* As the Court put it, “[t]he question in each case is what the purpose of Congress was.” *Id.* at 230.

¹⁰⁰ 373 U.S. 132 (1963). In *Florida Lime & Avocado Growers v. Paul*, after citing *Hines* for the proposition that federal displacement of state law turns on “whether the state regulation ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’” *id.* at 141 (quoting *Hines*, 312 U.S. at 67), the Court concluded that, “[b]y that test, we hold that [the California avocado regulation] is not such an obstacle; there is neither such actual conflict between the two schemes of regulation that both cannot stand in the same area, nor evidence of a congressional design to preempt the field,” *id.* The semicolon in that conclusion seems to function as a “because”—meaning that the Court concluded that there was no obstacle preemption *because* there was no field or direct conflict preemption. See *id.*

¹⁰¹ In *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), for example, the Court did consolidate the express, field, and conflict preemption prongs, but in doing so, it treated conflict preemption to mean only obstacle preemption, thus ignoring the first period of the Court's preemption jurisprudence. *Id.* at 525–26. In *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), Justice Marshall presented four distinct branches, but in a part of the opinion that Justice Stevens did not join, thus denying it the status of a majority opinion. *Id.* at 280–81 (plurality opinion).

¹⁰² See *supra* text accompanying note 35.

¹⁰³ *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990).

above, each of the four previous periods offered a novel conception of preemption based on a new judicial understanding of what it means for federal law to be supreme over state law. But over the past twenty-five years, beginning with the *English* decision, the Court has taken a different, and in my view, irrational, approach to preemption law. Instead of choosing one of the previous four periods and using that conception of preemption consistency as the governing test, or simply offering a new conception to supplant the previous ones, the Court has consolidated all of these internally consistent and independently derived conceptions of consistency into a single framework, with each conception applying to almost any preemption scenario presented before a court. This is irrational, in the literal sense of the word, because the first four preemption periods were not intended to, and conceptually do not, form a coherent framework together. The various doctrines, and the jurisprudential periods they represent, are rational in isolation, but not together as a doctrinal framework. This gives preemption the dubious distinction of being the most doctrinally confused area of constitutional law.¹⁰⁴

Why has the Court taken this irrational approach? One way to understand this development is in terms of jurisprudential style and theory. For example, we can understand the conflict period as expressing a formalist view of law, whereby logic constitutes the core of how judges understand legal consistency. The jurisdictional period, by contrast, embodies the judicial philosophy that law should be uniform, not necessarily because of any commands from formal logic, but because divergent legal

¹⁰⁴ There are, to be sure, other areas of law where doctrinal consolidation is unreasonable, but one would be hard-pressed to say that such areas of law are actually irrational in a logical sense. For example, Establishment Clause law is probably the most widely criticized area of the Court's jurisprudence for being chaotic, incoherent, and even contradictory. See, e.g., John W. Huleatt, *Accommodation or Endorsement? Stark v. Independent School District: Cause in the Tangle of Establishment Clause Chaos*, 72 ST. JOHN'S L. REV. 657, 657 (1998); Shahin Rezaei, Note, *County of Allegheny v. ACLU: Evolution of Chaos in Establishment Clause Analysis*, 40 AM. U. L. REV. 503, 504 (1990). This is because the multiple Establishment Clause tests often times pull in different directions, thereby giving judges an opportunity to pick and choose doctrines based on their preferred outcomes. Even in this convoluted area of law, however, there is significantly more order than in preemption. Indeed, courts, scholars, and advocates generally agree that the Endorsement Test applies when the government authorizes religious displays, see, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring), the Coercion Test applies when the government leads or induces oral speech, see, e.g., *Lee v. Weisman*, 505 U.S. 577, 587 (1992), and the infamous Lemon Test, from *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971), applies when the government funds religious organizations and activities—breaking down into the *Zelman v. Simmons-Harris*, 536 U.S. 639, 649, 652 (2002), rule when there is indirect funding and the *Mitchell v. Helms*, 530 U.S. 793, 807–09 (2000) (plurality opinion) (opinion of Thomas, J.), rule when there is direct funding. This is, to be sure, a highly complicated set of doctrines, and they certainly tug in different directions, but they are not irrational as a whole, because for the most part practitioners understand that the doctrines operate independently of one another, applying in different factual scenarios. Modern preemption law, by contrast, involves the consolidation of independent and internally consistent conceptions of what the Supremacy Clause means into one doctrinal framework—with each one overlapping with the other and applying to almost every preemption scenario presented before a court.

norms are burdensome on private enterprise.¹⁰⁵ The discretionary period dovetails with the advent of legal realism, a discursive approach to law whereby the normative content of federal and state law does not bind judges; what truly matters under this approach is the judicial effectuation of congressional will.¹⁰⁶ The functional period shifted this power away from Congress and toward the federal judiciary, as part of the period in American law when courts embraced a more activist and functional role in furthering congressional purposes—an approach that is related to but conceptually distinct from seeking to effectuate Congress’s intent or the normative content of the laws Congress enacted. And finally, the Rehnquist Court, as it often did, sought to doctrinalize the Court’s divergent strands, in an effort to stop the advancement of the Court’s progressivism in its tracks,¹⁰⁷ while still honoring the Court’s precedents in form.¹⁰⁸

The Rehnquist Court’s doctrinal consolidation, though perhaps a worthwhile judicial goal in seeking to secure compromise among the Justices’ divergent views, is largely responsible for the chaos pervading contemporary preemption law. Section I.B.5.a will take an empirical turn to explore this chaos, particularly on the Roberts Court.

¹⁰⁵ Gardbaum has argued that this period can be understood in terms of the *Lochner* Court’s politics, favoring a narrow but deep federal authority so as to achieve its economically libertarian goals. See Gardbaum, *Breadth vs. Depth*, *supra* note 14, at 48–50.

¹⁰⁶ Likewise, Gardbaum claims that the New Deal Court favored a congressional discretion approach because, as the Court expanded congressional authority under the Commerce Clause, it sought to limit preemption so that Congress could exercise its will as to when to preserve state authority. See *id.* at 70–71.

¹⁰⁷ See Neal Devins, *Ideological Cohesion and Precedent (or Why the Court Only Cares About Precedent When Most Justices Agree with Each Other)*, 86 N.C. L. REV. 1399, 1413–15 (2008). In this respect, the Rehnquist Court’s approach recalls William F. Buckley’s famous definition of a conservative as someone who “stands athwart history, yelling Stop[.]” William F. Buckley, Jr., *Our Mission Statement*, NAT’L REV. (Nov. 19, 1955), <http://www.nationalreview.com/article/223549/our-mission-statement-william-f-buckley-jr> [<https://perma.cc/4HCV-XDAX>]. Much of the legal conservative movement can be understood in such terms—i.e., as an effort to stop, or at least slow down, what may appear to be the ineluctable force of progressive change in law, particularly in constitutional law. For discussions of the legal conservative movement, see generally MICHAEL AVERY & DANIELLE McLAUGHLIN, *THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS* (2013); JEFFERSON DECKER, *THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT* (2016); AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* (2015); ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* (2008); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2010).

¹⁰⁸ One of the best illustrations of this practice is *United States v. Lopez*, 514 U.S. 549, 553–59 (1995), where Chief Justice Rehnquist sought to incorporate all of the Commerce Clause precedents, even those that many conservatives abhorred, such as *Wickard v. Filburn*, 317 U.S. 111 (1942), and *Katzenbach v. McClung*, 379 U.S. 294 (1964), and assimilate them into a three-part test.

a. The Roberts Court: Doctrinal Incoherence and Preemption Politics

This Section will consider the politics of preemption, based on an original empirical overview of the twenty-eight preemption cases that the Roberts Court has decided over its first eleven years.¹⁰⁹ In particular, this Section will analyze the rate at which the Roberts Court has ruled in favor of preemption, broken up by case subject-matter and preemption branch, demonstrating that some subjects and branches have a much stronger relationship than others to division within the Supreme Court. Based on this analysis, this Section will conclude that although it is unclear whether the Court's division is the cause or result of doctrinal incoherence, it is nonetheless clear that creating a sharper and more coherent preemption doctrine will promote the rule of law by limiting the financial costs and adjudicative unpredictability associated with preemption litigation.

Before we explore these cases, however, I would first like to explain my methodology. My list includes only those cases that actually employ a preemption analysis to the facts. In assembling this list, I used, but did not rely exclusively on, the Supreme Court Database,¹¹⁰ the most widely used dataset for political scientists studying the Supreme Court. Although the Database is extremely useful, it sometimes uses legal terms in ways that depart from how legal practitioners and scholars understand the law, leading political scientists to form conclusions that do not conform to legal practices.

I did not rely exclusively on the Database for precisely this reason. The Database includes two categories for preemption: (1) "federal pre-emption of state court

¹⁰⁹ Although there has only been limited empirical work on preemption, there have been some significant contributions. The most valuable such contribution is Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43 (2006). A subsequent Greve et al. article compared preemption in the Rehnquist and Roberts Courts. Michael S. Greve et al., *Preemption in the Rehnquist and Roberts Court: An Empirical Analysis*, 23 SUP. CT. ECON. REV. 353 (2015). My empirical analysis differs from the Greve et al. analysis both in terms of the depth (my analysis is much more cursory) and findings (my analysis includes, as well as excludes, some cases that the 2015 Greve et al. article does not). These departures will be highlighted in the following discussion. Some other important empirical works on preemption are CHRISTOPHER P. BANKS & JOHN C. BLAKEMAN, *THE U.S. SUPREME COURT AND NEW FEDERALISM: FROM THE REHNQUIST TO THE ROBERTS COURT* (2012); Brady Baybeck & William Lowry, *Federalism Outcomes and Ideological Preferences: The U.S. Supreme Court and Preemption Cases*, PUBLIUS, Summer 2000, at 73; Gregory M. Dickinson, *An Empirical Study of Obstacle Preemption in the Supreme Court*, 89 NEB L. REV. 682 (2011); Bradley W. Joondeph, *The Partisan Dimensions of Federal Preemption in the United States Courts of Appeals*, 2011 UTAH L. REV. 223; David M. O'Brien, *The Rehnquist Court and Federal Preemption: In Search of a Theory*, PUBLIUS, Fall 1993, at 15; David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CALIF. L. REV. 1125 (1999).

¹¹⁰ Harold J. Spaeth et al., *2016 Supreme Court Database, Version 2016 Release 1*, SUP. CT. DATABASE, <http://scdb.wustl.edu/> [<https://perma.cc/TG5Q-QAQ7>].

jurisdiction,” and (2) “federal pre-emption of state legislation or regulation. cf. state regulation of business. rarely involves union activity. Does not involve constitutional interpretation unless the Court says it does.”¹¹¹ This first category is arguably a form of preemption in a technical sense, in that it involves federal law displacing state authority, but it does not fit with how courts apply preemption doctrine. That is, courts do not apply the four branches of preemption to cases raising the question whether state court jurisdiction has been eliminated by federal court jurisdiction. As a result, the Database is overinclusive, including six non-preemption cases, only two of which even mention the word “preempt” in any of the opinions, and none of which apply the Court’s preemption analysis.¹¹²

Scholars who have relied on the Database for their lists have collected cases that vary greatly from my list. For example, one of the most extensive empirical surveys of preemption appears in Christopher Banks and John Blakeman’s *The U.S. Supreme Court and the New Federalism: From the Rehnquist to the Roberts Court*, and as a result of relying exclusively on the Database, the Banks and Blakeman analysis includes two non-preemption cases.¹¹³ Curiously, Banks and Blakeman do not include in their list the other four non-preemption cases featured on the Database. Perhaps even more curiously, Banks and Blakeman add seven cases that are not featured on the Database, but only one of these is a preemption case.¹¹⁴

¹¹¹ *Analysis Specifications—Modern Data (1946–2015)*, SUP. CT. DATABASE, <http://scdb.wustl.edu/analysis.php> [<https://perma.cc/86Y9-RY2N>].

¹¹² The six non-preemption cases included on the Database are the following: (1) *Vaden v. Discover Bank*, 556 U.S. 49 (2009), a federal jurisdiction case that mentions the word “preempt” in a non-doctrinal sense but does not apply preemption analysis at all; (2) *Smith v. Bayer Corp.*, 564 U.S. 291 (2011), an Anti-Injunction Act case that does not mention the word “preempt” at all; (3) *Medellín v. Texas*, 552 U.S. 491, 523 (2008), an International Court of Justice enforceability case that does mention the word “preempt” in citing the U.S. Amicus Brief but does not apply preemption analysis at all; (4) *Harbison v. Bell*, 556 U.S. 180 (2009), a federal habeas case that does not mention the word “preempt” in any of the opinions; (5) *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010), a comity case that does not mention the word “preempt” in any of the opinions; and (6) *Gunn v. Minton*, 568 U.S. ___, 133 S. Ct. 1059 (2013), a federal jurisdiction patent case that does not mention the word “preempt” at all.

¹¹³ The cases are *Vaden*, 556 U.S. 49, and *Bayer Corp.*, 564 U.S. 291. BANKS & BLAKEMAN, *supra* note 109, at 279–80.

¹¹⁴ The only preemption case is *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). BANKS & BLAKEMAN, *supra* note 109, at 327. The remaining six are non-preemption cases: (1) *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), a Federal Arbitration Act case that does not mention the word “preempt” in any of the opinions; (2) *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158 (2007), a Federal Employers’ Liability Act case that does not mention the word “preempt” in any of the opinions; (3) *CSX Transportation, Inc. v. Georgia State Board of Equalization*, 552 U.S. 9 (2007), a Railroad Revitalization and Regulatory Reform Act case, rejecting the state’s independent authority to determine railroad property tax rates, but not mentioning the word “preempt” at all; (4) *Florida Department of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33 (2008), a bankruptcy tax case that does not mention the word “preempt”; (5) *Shady Grove Orthopedic Associates v. Allstate Insurance*

By reviewing all of the cases on the Database, as well as all of the cases featured in every major piece of empirical work on preemption, and then excluding all of the cases that do not contain a single opinion employing a preemption analysis to the facts, I collected the twenty-eight decided cases included in Appendix A.¹¹⁵ I found several interesting trends in these cases, described below.

i. Voting Breakdown by Justice

Of the twenty-eight preemption cases decided between 2006 and 2016, the Roberts Court has ruled in favor of preemption nineteen times, a 68% preemption rate,¹¹⁶ significantly higher than the preemption rate of previous Courts.¹¹⁷ This has prompted many liberal scholars to point out the internal inconsistency of a conservative-led Court favoring preemption, a doctrine that limits state autonomy, at such a high rate.¹¹⁸ Of course, this principle-decisional inconsistency (i.e., this inconsistency between a Justice's general legal principles and particular case decisions) is common

Co., 559 U.S. 393 (2010), an *Erie* case, involving whether, for purposes of diversity jurisdiction, Federal Rule of Civil Procedure 23 prevails over New York's bar on class actions for certain statutory-damages claims; Justice Ginsburg's dissent is the only opinion to mention the word "preempt" but even this opinion does not apply the analysis, *id.* at 437 (Ginsburg, J., dissenting); (6) *CSX Transportation, Inc. v. Alabama Department of Revenue*, 562 U.S. 277 (2011), a Railroad Revitalization and Regulatory Reform Act case, holding that the Act prohibits states from imposing discriminatory tax rates against railroads and rejecting the state's independent authority to determine railroad property tax rates; the opinion does mention how the Act speaks in "preemptive terms," *id.* at 293, but none of the opinions applies the preemption analysis to determine the scope of these terms.

¹¹⁵ I counted twenty-nine preemption cases that have been argued before the Roberts Court, but one case, *Warner-Lambert Co. v. Kent*, 552 U.S. 440, 441 (2008), was not decided, because the Court divided 4-4 on the outcome, with Chief Justice Roberts not participating in the case.

¹¹⁶ *Infra* Table 1.

¹¹⁷ For example, in an extensive empirical study of preemption between 1921 and 1993, David O'Brien found that 92 of 183 preemption cases (50.2%) were decided in favor of preemption. O'Brien, *supra* note 109, at 522.

¹¹⁸ *See, e.g.*, Chemerinsky, *supra* note 10, at 62.

One would expect that a conservative Court, committed to protecting states' rights, would narrow the scope of federal preemption. After all, a good way to empower state governments is to restrict the federal government's reach. Restricting preemption gives state governments more autonomy.

But there is every indication that the Roberts Court, although unquestionably conservative, will interpret preemption doctrines broadly when businesses challenge state and local laws.

Id. Curiously, there has been nearly no criticism the other way around: The liberal Justices also violate, or at least substantially undermine, their own theories of process federalism by opposing preemption, but conservatives seem not to notice, or not to mind, this inconsistency. This may be because some conservative scholars are delighted to see the liberal Justices embrace some judicially enforced limitations on federal authority, even if it is expressed in ways conservatives might disfavor in particular cases.

to all legal issues relating to federalism—one’s position on federal authority often comes down to the old question of whose ox is being gored¹¹⁹—but as compared to other areas of federalism, this inconsistency is much more common in preemption cases. Indeed, we see much more principle-decisional consistency among both liberals and conservatives in Commerce Clause cases, no matter the regulation at issue.¹²⁰

With preemption, however, particularly under the Roberts Court, we see liberal Justices supporting limits on federal authority more often than conservatives. For example, Justice Ginsburg voted for preemption in only thirteen out of the twenty-eight Roberts Court preemption cases (a 46% rate), and Justice Sotomayor voted for preemption at an even lower rate, in eight out of the nineteen Roberts Court preemption cases in which she has issued a vote (a 42% rate).¹²¹ By contrast, Chief Justice Roberts voted for preemption in twenty-one of the twenty-eight cases (a 75% rate), the highest rate on the Court.¹²² The next highest ratio belongs to Justice Kennedy, who voted for preemption twenty out of twenty-eight times (a 71% rate).¹²³ The remaining conservatives—Justices Alito, Scalia, and Thomas—voted for preemption nineteen, eighteen, and sixteen times, respectively, out of twenty-seven voting opportunities (70%, 67%, and 59% rates, respectively).¹²⁴ The remaining liberals—Justices Stevens, Souter, Breyer, and Kagan—voted for preemption at 56%, 67%, 57%, and 53% rates, respectively.¹²⁵ Notably, these ideological divisions on preemption have appeared outside of the courts, as vividly illustrated in the Bush II Administration’s openly supporting preemption, based on the possible “disrupt[ion]” that state courts might impose on federal drug regulation,¹²⁶ and the Obama Administration’s vigorously opposing preemption, as

¹¹⁹ See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 948 (1994) (arguing that “claims of federalism are often nothing more than strategies to advance substantive positions” and that “people declare themselves federalists when they oppose national policy, and abandon that commitment when they favor it”). This is because federalism is a jurisdictional rather than a substantive principle. As a result, support for limitations on federal authority often relates to which party controls the federal government—a relationship evidenced by liberals favoring federalism more during the Bush years and conservatives favoring it more during the Obama years. See Kathleen M. Sullivan, *From States’ Rights Blues to Blue States’ Rights: Federalism After the Rehnquist Court*, 75 FORDHAM L. REV. 799, 810–11 (2006) (observing a similar trend in the 1950s).

¹²⁰ The paradigmatic case in which federalism, as a constitutional principle, prevailed over bare party politics is *Gonzales v. Raich*, 545 U.S. 1 (2005).

¹²¹ See *infra* Table 1.

¹²² See *infra* Table 1.

¹²³ See *infra* Table 1.

¹²⁴ These three Justices all participated in only twenty-seven preemption decisions. See *infra* Table 1.

¹²⁵ See *infra* Table 1. The Roberts Court sample is somewhat small, however, for Justices Stevens and Souter, who issued votes in only nine Roberts Court preemption cases. Kagan has issued a vote in fifteen Roberts Court preemption cases, and Breyer has issued a vote in all twenty-eight. See *infra* Table 1.

¹²⁶ See, e.g., Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3969 (Jan. 24, 2006) (codified at 21 C.F.R.

part of its commitment to “the legitimate prerogatives of the States[.]”¹²⁷ a commitment that the Administration has not always displayed in other areas of law.¹²⁸

One of the more interesting features of the voting breakdown is that ideological divisions have arisen not only between, but also *within*, the conservative and liberal wings of the Court.¹²⁹ Indeed, the Republican-appointed Justices most squarely within the pro-preemption wing of the party are the libertarian Justice Kennedy and the pro-business Chief Justice Roberts, and the Republican-appointed Justice least likely to favor preemption is the more tradition-oriented and communitarian Justice Thomas. This distinguishes preemption from many other areas of constitutional law, where there is often a strong correlation between how conservative a Justice is, based on Martin-Quinn scores,¹³⁰ and how the Justice will rule on a given case. For example, based on how conservative a Justice is under the Martin-Quinn metric, we can generally predict the likelihood of a Justice ruling in favor of extending non-economic individual liberties (such as abortion or gay rights) or in favor of limiting the federal commerce power—the more conservative, the less likely to extend non-economic liberties and the more likely to limit the federal commerce power.¹³¹

For preemption, however, while there is generally such a correlation on the liberal wing of the Court—with the liberal Justices on the far left of the judicial ideological spectrum (Ginsburg and Sotomayor) less likely to favor preemption than the liberal Justices closer to the center (Kagan and Breyer)—this correlation does not hold for the conservative wing of the Court—with the center-right Justices (Roberts and Kennedy) more likely to favor preemption than those farther to the right (Alito, Scalia, and Thomas). Thus, while there is a general relationship between conservatism and favoring

§§ 201, 314, 601) (declaring that preemption is required, because “[i]f State authorities, including judges and juries applying State law, were permitted to reach conclusions about the safety and effectiveness [of labels] . . . , the federal system for regulation of drugs would be disrupted”).

¹²⁷ See, e.g., Preemption: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 24,693, 24,693 (May 20, 2009) (declaring that “preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption”).

¹²⁸ See, e.g., Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. ___, 132 S. Ct. 2566 (2012) (holding that the Affordable Care Act Medicaid requirements for states were unconstitutional).

¹²⁹ Following federalism principles in the preemption context means ruling for *more* governmental regulation on a subject—thus highlighting a growing rift within the Republican Party between the pro-preemption, business-oriented, libertarian wing, and the anti-preemption, tradition-oriented, communitarian wing. It should be noted that this division has animated the development of preemption doctrine, with the conservative *Lochner* Court favoring preemption, because it was principally a libertarian form of conservatism that dominated that era of jurisprudence. See Gardbaum, *Breadth vs. Depth*, *supra* note 14, at 48.

¹³⁰ See generally MARTIN-QUINN SCORES, <http://mqscores.berkeley.edu/> [<https://perma.cc/25G5-F635>].

¹³¹ See generally Anthony Niblett & Albert H. Yoon, *Friendly Precedent*, 57 WM. & MARY L. REV. 1789, 1807–09 (2016) (using two Commerce Clause cases to show that the result correlated with the Court’s ideological mean).

preemption, there is the opposite relationship for *degrees* of conservatism and favoring preemption. There seems to be something about the center of the judicial spectrum that is conducive to favoring preemption. Table 1 illustrates this phenomenon by tabulating the voting of the Justices on the twenty-eight preemption cases and lining up the Justices left-to-right according to how liberal or conservative they are under the Martin-Quinn methodology.

	SCOTUS	Stevens	Ginsburg	Sotomayor	Kagan	Souter	Breyer	Kennedy	Roberts	Alito	Scalia	Thomas
Merrill	1	1	1	NC	NC	1	1	1	1	NP	1	1
Watters	1	0	1	NC	NC	1	1	1	0	1	0	NP
Rowe	1	1	1	NC	NC	1	1	1	1	1	1	1
Preston	1	1	1	NC	NC	1	1	1	1	1	1	0
Riegel	1	1	0	NC	NC	1	1	1	1	1	1	1
Chamber of Commerce v. Brown	1	1	0	NC	NC	1	0	1	1	1	1	1
Altria	0	0	0	NC	NC	0	0	0	1	1	1	1
Wyeth	0	0	0	NC	NC	0	0	0	1	1	1	0
Cuomo	0	0	0	NC	NC	0	0	1	1	1	0	1
AT&T	1	NC	0	0	0	NC	0	1	1	1	1	1
Bruesewitz	1	NC	0	0	NP	NC	1	1	1	1	1	1
Williamson	0	NC	0	0	NP	NC	0	0	0	0	0	0
Whiting	0	NC	1	1	NP	NC	1	0	0	0	0	0
PLIVA	1	NC	0	0	0	NC	0	1	1	1	1	1
National Meat Association	1	NC	1	1	1	NC	1	1	1	1	1	1
Kurns	1	NC	0	0	1	NC	0	1	1	1	1	1
Arizona	1	NC	1	1	NP	NC	1	1	1	0	0	0
Wos	1	NC	1	1	1	NC	1	1	0	1	0	0
Hillman	1	NC	1	1	1	NC	1	1	1	1	1	1
American Trucking	1	NC	1	1	1	NC	1	1	1	1	1	1
Dan's City Used Cars	0	NC	0	0	0	NC	0	0	0	0	0	0
Tarrant	0	NC	0	0	0	NC	0	0	0	0	0	0
Bartlett	1	NC	0	0	0	NC	0	1	1	1	1	1
Arizona Tribal	1	NC	1	1	1	NC	1	1	1	0	1	0
Northwest v. Ginsberg	1	NC	1	1	1	NC	1	1	1	1	1	1
CTS	0	NC	1	0	0	NC	1	0	0	0	0	0
Oneok	0	NC	0	0	0	NC	0	0	1	0	1	0
Gobiele	1	NC	0	0	1	NC	1	1	1	1	NC	1
Total Number of Pro-Preemption Votes	19	5	13	8	8	6	16	20	21	19	18	16
Aggregate Pro-Preemption Rate	68%	56%	46%	42%	53%	67%	57%	71%	75%	70%	67%	59%

1 = Pro-Preemption; 0 = Anti-Preemption; NP = Did not participate; NC = Not on the Court
See Appendix A for a full list of the cases.

ii. Voting Breakdown by Case Subject-Matter

We can further see the Court's ideological divisions, both between and within the factions on the Court, by breaking preemption cases down by particularly salient subjects. Of the twenty-eight Roberts Court cases, four involved the question of whether the FDA preempted state tort actions, an issue of particular interest to the Defense Bar and the Bush Administration.¹³² In these four cases, the Court ruled for preemption three times, as did Justices Kennedy and Thomas, but Chief Justice Roberts, along with Justices Alito and Scalia, voted for preemption in all four cases.¹³³ Justice Breyer voted for preemption in one of these four cases.¹³⁴ By contrast, Justice Ginsburg voted for preemption in none of the four cases,¹³⁵ and Justices Kagan and Sotomayor voted for preemption in none of the three in which they were involved.¹³⁶

	SCOTUS	Stevens	Ginsburg	Sotomayor	Kagan	Souter	Breyer	Kennedy	Roberts	Alito	Scalia	Thomas
Riegel	1	1	0	NC	NC	1	1	1	1	1	1	1
Wyeth	0	0	0	NC	NC	0	0	0	1	1	1	0
PLIVA	1	NC	0	0	0	NC	0	1	1	1	1	1
Bartlett	1	NC	0	0	0	NC	0	1	1	1	1	1
Total Number of Pro-Preemption Decisions	3	1	0	0	0	1	1	3	4	4	4	3
Aggregate Pro-Preemption Rate	75%	50%	0%	0%	0%	50%	25%	75%	100%	100%	100%	75%

1 = Pro-Preemption; 0 = Anti-Preemption; NP = Did not participate; NC = Not on the Court
See Appendix A for a full list of the cases.

Likewise, in the larger category of cases that could be characterized as tort reform preemption cases, which includes these four FDA cases but also includes five other cases in which a plaintiff's access to a judicial tort remedy was at issue,¹³⁷ the ideological divide is equally sharp. The Court ruled for preemption in six of these nine cases, with Chief Justice Roberts, as well as Justices Scalia and Alito, supporting preemption

¹³² *Mutual Pharm. Co. v. Bartlett*, 570 U.S. ___, 133 S. Ct. 2466 (2013); *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011); *Wyeth v. Levine*, 555 U.S. 555 (2009); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008).

¹³³ See *infra* Table 2.

¹³⁴ See *infra* Table 2.

¹³⁵ See *infra* Table 2.

¹³⁶ See *infra* Table 2.

¹³⁷ *Mutual Pharm.*, 133 S. Ct. 2466; *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. ___, 132 S. Ct. 1261 (2012); *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323 (2011); *PLIVA, Inc.*, 564 U.S. 604; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Bruesewitz v. Wyeth*, 562 U.S. 223 (2011); *Wyeth*, 555 U.S. 555; *Altria Grp., Inc. v. Good*, 555 U.S. 70 (2008); *Riegel*, 552 U.S. 312.

in all but one (an 89% rate, substantially above their aggregate rates for all preemption cases),¹³⁸ and Justices Sotomayor and Ginsburg, the most ardent anti-preemption members, supporting preemption in none (far below their respective aggregate 42% and 46% rates for all preemption cases).¹³⁹

	SCOTUS	Stevens	Ginsburg	Sotomayor	Kagan	Souter	Breyer	Kennedy	Roberts	Alito	Scalia	Thomas
Riegel	1	1	0	NC	NC	1	1	1	1	1	1	1
Altria	0	0	0	NC	NC	0	0	0	1	1	1	1
Wyeth	0	0	0	NC	NC	0	0	0	1	1	1	0
AT&T	1	NC	0	0	0	NC	0	1	1	1	1	1
Bruesewitz	1	NC	0	0	NP	NC	1	1	1	1	1	1
Williamson	0	NC	0	0	NP	NC	0	0	0	0	0	0
PLIVA	1	NC	0	0	0	NC	0	1	1	1	1	1
Kurms	1	NC	0	0	1	NC	0	1	1	1	1	1
Bartlett	1	NC	0	0	0	NC	0	1	1	1	1	1
Total Number of Pro-Preemption Decisions	6	1	0	0	1	1	2	6	8	8	8	7
Aggregate Pro-Preemption Rate	67%	33%	0%	0%	25%	33%	22%	67%	89%	89%	89%	78%

1 = Pro-Preemption; 0 = Anti-Preemption; NP = Did not participate; NC = Not on the Court
See Appendix A for a full list of the cases.

We see the opposite scenario if we move from an area where liberals favor state autonomy (tort reform) to one where they do not (immigration reform). In the three Roberts Court cases involving whether federal immigration law preempted state immigration reform,¹⁴⁰ Justices Ginsburg and Sotomayor completely reversed their positions, becoming pro-preemption proponents, supporting preemption in all three.¹⁴¹ This is particularly interesting for Sotomayor, given that she voted for preemption in only eight cases overall;¹⁴² these three constituted nearly half of all of her pro-preemption votes. In this area of law, Chief Justice Roberts and Justice Kennedy stuck to their strong pro-preemption stances, supporting preemption of state-led immigration reform in two of the three cases.¹⁴³ But Justices Alito and Thomas supported preemption in none of the three cases,¹⁴⁴ which is especially noteworthy for Alito,

¹³⁸ See *infra* Table 3. The only tort reform preemption case in which these Justices did not vote for preemption was *Williamson*, 562 U.S. 323. See *infra* Table 3.

¹³⁹ See *infra* Table 3. Justice Ginsburg participated in all nine of these decisions, but Justice Sotomayor participated in only six. See *supra* Table 1.

¹⁴⁰ *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. ___, 133 S. Ct. 2247 (2013); *Arizona v. United States*, 567 U.S. ___, 132 S. Ct. 2492 (2012); *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582 (2011).

¹⁴¹ See *infra* Table 4.

¹⁴² See *supra* Table 1.

¹⁴³ See *infra* Table 4.

¹⁴⁴ See *infra* Table 4.

given that he had the third highest aggregate preemption rate at 70%.¹⁴⁵ In fact, in immigration law, Alito was the mirror image of Sotomayor, in that these three immigration cases accounted for three of the eight cases in which Alito voted *against* preemption.¹⁴⁶ Immigration preemption divided the conservative wing of the Court more than any other issue, which should not be surprising, given that immigration has been dividing the Republican Party in general.¹⁴⁷ Chief Justice Roberts and Justice Kennedy, representing the more culturally progressive and pro-business faction of the Republican Party, and Justices Alito, Scalia, and Thomas, representing the more traditionalist and communitarian faction of the Republican Party, seem to have carried their policy preferences into their preemption decision-making.

	SCOTUS	Stevens	Ginsburg	Sotomayor	Kagan	Souter	Breyer	Kennedy	Roberts	Alito	Scalia	Thomas
Whiting	0	NC	1	1	NP	NC	1	0	0	0	0	0
Arizona	1	NC	1	1	NP	NC	1	1	1	0	0	0
Arizona Tribal	1	NC	1	1	1	NC	1	1	1	0	1	0
Total Number of Pro-Preemption Decisions	2	NC	3	3	1	NC	3	2	2	0	1	0
Aggregate Pro-Preemption Rate	67%	NA	100%	100%	100%	NA	100%	67%	67%	0%	33%	0%

1 = Pro-Preemption; 0 = Anti-Preemption; NP = Did not participate; NC = Not on the Court; NA = Not Available. See Appendix A for a full list of the cases.

iii. Voting Breakdown by Preemption Branch

The Roberts Court decided five of these twenty-eight preemption cases by a strictly unanimous ruling (i.e., without either a dissenting or a concurring opinion)¹⁴⁸—an 18% rate, far below the Roberts Court average of rendering unanimous decisions in slightly over 50% for all types of cases.¹⁴⁹ All of these five unanimous preemption

¹⁴⁵ See *supra* Table 1.

¹⁴⁶ See *supra* Table 1; *infra* Table 4.

¹⁴⁷ See generally María Pabón López & Natasha Ann Lacoste, *Immigration Reform in 2013–14: An Essay on the Senate’s Bipartisan Plan, the House’s Standards for Immigration Reform, Interest Convergence and Political Realities*, 17 HARV. LATINO L. REV. 121 (2014) (discussing congressional battles between Republican factions over immigration reform).

¹⁴⁸ *Northwest, Inc. v. Ginsberg*, 572 U.S. ___, 134 S. Ct. 1422 (2014); *Tarrant Reg’l Water Dist. v. Herrmann*, 569 U.S. ___, 133 S. Ct. 2120 (2013); *Dan’s City Used Cars, Inc. v. Pelkey*, 569 U.S. ___, 133 S. Ct. 1769 (2013); *Nat’l Meat Ass’n v. Harris*, 565 U.S. 452 (2012); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71 (2006).

¹⁴⁹ See Adam Liptak, *Justices Agree to Agree, at Least for the Moment*, N.Y. TIMES (May 27, 2013), <http://www.nytimes.com/2013/05/28/us/supreme-court-issuing-more-unani>

decisions either found no preemption or found preemption based on the express branch of the doctrine.¹⁵⁰

The most sharply divided implied preemption cases on the Roberts Court have arisen under conflict preemption. Of the seven Roberts Court decisions finding conflict (impossibility or obstacle) preemption, four rested on razor-thin five-Justice majorities.¹⁵¹ By contrast, of the eleven cases finding express preemption, only one rested on a five-Justice majority, and that was likely a result of Justice Thomas not participating.¹⁵² Moreover, all of the four conflict preemption cases decided by five-Justice majorities involved the politically controversial subjects of tort reform or immigration.¹⁵³

In sum, while a more thorough empirical analysis is certainly necessary to investigate whether preemption doctrine has contributed to all of this division, between and within the familiar coalitions on the Court, it is clear from our preliminary survey that the Roberts Court is deeply fractured over preemption. It is equally clear that when there have been “strange bedfellow” opinions on the Roberts Court, it has had more to do with a serendipitous alignment of judicial politics than the efficacy of preemption doctrine in constraining judicial discretion. Whether the incoherence of preemption doctrine is the symptom or the direct cause of what Thomas McGarity calls “the preemption war[,]”¹⁵⁴ this incoherence is certainly part of the problem. Indeed, one does not need to take the position that legal doctrines absolutely constrain judicial discretion and generate decisional outcomes to believe that what Justice Scalia recently dubbed “[t]he Court’s make-it-up-as-you-go-along approach to

mous-rulings.html [https://perma.cc/LLQ7-3AZT] (stating that the rate of unanimous rulings in recent years had been between 40% and 60%).

¹⁵⁰ *Northwest, Inc.*, 134 S. Ct. at 1429; *Herrmann*, 133 S. Ct. at 2137; *Pelkey*, 133 S. Ct. at 1778; *Nat’l Meat Ass’n*, 565 U.S. at 468; *Merrill Lynch*, 547 U.S. at 85–87. A tempting way to look at these cases is that express preemption doctrine *created* the consensus. This is likely a partial rather than a complete explanation. The other part of the explanation may be that the Justices already agreed with one another on the outcome and the Court then used express preemption to provide the most narrow and least controversial basis for that outcome. This account is supported by the fact that express preemption is rarely utilized in cases involving controversial subjects, such as immigration and tort reform, despite being appealed to by the party seeking preemption. Indeed, only one of the nine Roberts Court tort reform preemption cases was decided on the basis of express preemption. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 231–33 (2011). None of the three immigration preemption cases was decided on the basis of express preemption. *See Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. ___, 133 S. Ct. 2247, 2253–57 (2013) (finding that proof of citizenship requirements under Arizona law was “inconsistent with” the National Voting Rights Act); *Arizona v. United States*, 567 U.S. ___, 132 S. Ct. 2492, 2502–06 (2012) (finding preemption largely on field and obstacle grounds); *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582, 600 (2011) (finding no express preemption).

¹⁵¹ *Mutual Pharm. Co. v. Bartlett*, 570 U.S. ___, 133 S. Ct. 2466 (2013) (5–4 decision); *Arizona*, 132 S. Ct. 2492 (5–3 decision); *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011) (5–4 decision); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (5–4 decision).

¹⁵² *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 4 (2007).

¹⁵³ *See supra* Tables 3, 4.

¹⁵⁴ MCGARITY, *supra* note 10, at 58.

preemption[.]”¹⁵⁵ is a problem and must be reformed so as to create some peace between these warring positions. Even if a clearer preemption doctrine would not produce more consensus among the Justices, it would at least cut down on the enormous costs incurred in litigating preemption cases under each of the current branches of the preemption tree.¹⁵⁶ There have been several important proposals to cut down on these transaction costs—proposals that we will cover in Part II by dividing them into formalist and functionalist approaches.

II. PROPOSED SOLUTIONS: FORMALIST AND FUNCTIONALIST APPROACHES

Formalist solutions have sought to reconceptualize preemption doctrine to turn only on the formal or logical relationship between the normative content embodied in the federal and state laws.¹⁵⁷ This does not necessarily require returning to the first or second periods discussed above, but such an approach is obviously much more in line with these periods than with the third and fourth. Functionalist solutions, by contrast, have focused more on the practical relationship between federal and state laws, calling for courts to make factually sensitive and careful inquiries into the applicable federal statute, including its drafting history and broader context, to determine whether the state law would undermine or interfere with its purpose.¹⁵⁸ This often comes down to balancing the federal and state interests at stake in that particular regulatory scheme. Such proposals, therefore, endorse the latter two periods much more than the former two, though functionalist proposals often consolidate all of the factors expressed in the various periods as part of one all-encompassing, all-things-considered, balancing test.¹⁵⁹ Below, we will examine the leading formalist and functionalist

¹⁵⁵ *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. ___, 135 S. Ct. 1591, 1603 (2015) (Scalia, J., dissenting).

¹⁵⁶ For a rough sample of just the litigation generated by the Bush Administration’s FDA Preemption Preamble, see Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 237–42 (2007). Just as partisan politics have dominated preemption cases in the Supreme Court, they have had the same effect on the lower courts. Indeed, not only does the doctrine not constrain the Court itself, but it does not even constrain lower courts under vertical stare decisis. See Joondeph, *supra* note 109, at 225 (finding that “in the most contested preemption cases—those in which at least one Republican and one Democrat served on the panel, and at least one judge dissented—Republican appointees were more than three times as likely as Democratic appointees to vote in favor of preemption (roughly 73% versus 21%)”). As the eminent Professor Geoffrey Hazard has summarized the problem, the Court’s preemption doctrine has proven “incapable of dealing with ‘the relations between state and federal law’ in a satisfactory way.” Geoffrey C. Hazard, Jr., *Quasi-Preemption: Nervous Breakdown in Our Constitutional System*, 84 TUL. L. REV. 1143, 1145 (2010) (quoting Hart, Jr., *supra* note 24, at 489). This has produced “huge transaction costs” and “cynicism about government and disrespect for the rule of law.” *Id.* at 1155–56.

¹⁵⁷ Gardbaum, *Nature of Preemption*, *supra* note 14, at 771.

¹⁵⁸ See, e.g., Meltzer, *supra* note 17, at 56–57.

¹⁵⁹ See *id.* at 39.

proposals, in the process evaluating their relative strengths and weaknesses, before moving on to use these proposals to develop our own proposal in Part III.

A. Formalist Proposals

In a groundbreaking 1994 article, Professor Stephen Gardbaum made one of the most novel and compelling proposals to reform preemption doctrine.¹⁶⁰ According to Gardbaum, the term “supremacy” in the Supremacy Clause refers to consistency and, therefore, does not warrant the displacement of state laws unless there is an actual inconsistency between federal and state laws.¹⁶¹ Thus, to the extent that preemption does not deal with consistency between federal and state laws, the doctrine is not actually derived from the Supremacy Clause but rather from somewhere else in the Constitution—most plausibly, Gardbaum argues, from the Necessary and Proper Clause.¹⁶² In five subsequent works, Gardbaum has built on this argument, claiming that the Supremacy Clause, viewed as a consistency guarantee, warrants only impossibility preemption.¹⁶³

Caleb Nelson’s proposal¹⁶⁴ resembles Gardbaum’s argument but differs in two fundamental ways. One important difference is methodological: whereas Gardbaum’s argument is largely conceptual, in that he derives his claim about preemption from his conception of what supremacy means in the preemption context,¹⁶⁵ Nelson’s argument is more historical, looking to a wealth of eighteenth- and nineteenth-century sources¹⁶⁶ to argue that the phrase “to the Contrary notwithstanding” in the Supremacy Clause is a “*non obstante* clause.”¹⁶⁷ Such clauses, Nelson explains, were widely used by “legal draftsman in late eighteenth-century America . . . to acknowledge that a statute

¹⁶⁰ Gardbaum, *Nature of Preemption*, *supra* note 14.

¹⁶¹ *See id.* at 770.

¹⁶² *Id.* at 781–83.

¹⁶³ *See* sources cited *supra* note 14; *see also* Gardbaum, *Congress’s Power*, *supra* note 14, at 62. Gardbaum argues explicitly that: (1) express preemption cannot be justified under the Supremacy Clause (because states do not enact inconsistent laws merely by contravening Congress’s intent) but may be justified under the Necessary and Proper Clause, *id.* at 60–61; (2) field preemption cannot be justified under either the Supremacy Clause (because there is no inherent inconsistency between federal and state laws covering the same category of regulation), or the Necessary and Proper Clause (because that would make preemption implied from an implied power, a double inference that Gardbaum finds untenable), *id.* at 61; and (3) obstacle preemption arguably cannot be justified under the Supremacy Clause (because “it seems reasonably clear from first principles that supremacy requires irreconcilability between state and federal laws and not mere interference or inconvenience”), *id.* at 62.

¹⁶⁴ Nelson, *supra* note 2, at 231–32 (providing a summary of Nelson’s assertion of conflict preemption and rejection of obstacle preemption).

¹⁶⁵ Gardbaum, *Congress’s Power*, *supra* note 14, at 40–43.

¹⁶⁶ Some of Nelson’s more significant sources are Blackstone, Nelson, *supra* note 2, at 236–37 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *59, *89–90 (1765)), eighteenth-century statutes, *id.* at 238 nn.42–43 (citations omitted), and eighteenth-century state case law on federal preemption, *id.* at 253–54 nn.85–86 (citations omitted).

¹⁶⁷ *Id.* at 239–40, 254–60 (noting that *non obstante* is Latin for “notwithstanding”).

might contradict some other laws and to instruct courts not to apply the traditional presumption against implied repeals.¹⁶⁸ Nelson reasons that if we read the Supremacy Clause as a *non obstante* clause, the Clause should operate analogously to what he refers to as the “doctrine of repeals,” providing the presumption against later statutes repealing previous ones.¹⁶⁹ Just as how the repeals doctrine calls for courts to invalidate a provision in statute *X* passed at time *A* if, and only if, statute *Y* passed at time *A+B* conflicts with it, the Supremacy Clause commands courts to hold that a federal law displaces a state law if, and only if, the federal law actually conflicts with the state law.¹⁷⁰

In framing the Supremacy Clause as a *non obstante* clause, so that the repeals and preemption doctrines operate analogously, Nelson sheds light on the type of consistency required by the Supremacy Clause. In both preemption and repeals cases, courts must ensure a *logical* consistency between laws: in the repeals context, logical consistency is required between laws passed at different times, and in the preemption context, logical consistency is required between laws passed by different levels of government.¹⁷¹ Nelson thus proposes consolidating the incoherent four-part preemption test described above into a single “logical contradiction” test.¹⁷² Nelson defines this test in the following terms: Courts must apply preemption “to disregard state law if, but only if, it contradicts a rule validly established by federal law.”¹⁷³

That brings us to the second fundamental difference between Gardbaum’s and Nelson’s arguments. Although both Gardbaum and Nelson hold that the Supremacy Clause is only about legal consistency, Nelson and Gardbaum differ in what it *means* for two laws to be consistent with one another. Whereas Gardbaum argues that inconsistency comes down entirely to the normative content embodied in the federal and state enactments, not any intent or purpose that may have motivated their passage,¹⁷⁴ Nelson contends that there is an inconsistency between federal and state laws not only when federal and state laws jointly render it physically impossible for an individual to comply with both commands, but also when state law contravenes Congress’s expressed or implied intent in the federal law.¹⁷⁵ As a result, under Nelson’s logical contradiction test, all of the Court’s current preemption branches, except obstacle preemption,¹⁷⁶ would be preserved, because under Nelson’s conception of consistency,

¹⁶⁸ *Id.* at 232.

¹⁶⁹ *Id.* at 241, 246.

¹⁷⁰ *Id.* at 250.

¹⁷¹ *Id.* at 252.

¹⁷² *Id.* at 260.

¹⁷³ *Id.*; see also *id.* at 234, 252.

¹⁷⁴ Gardbaum, *Nature of Preemption*, *supra* note 14, at 770.

¹⁷⁵ Nelson, *supra* note 2, at 276–77 (stating that the basic question in preemption cases is one of congressional intent and whether the enactment was meant to set aside the laws of the state).

¹⁷⁶ *Id.* at 231–32, 265–90. Nelson also argues that his interpretation of the Supremacy Clause requires eliminating the presumption against preemption because the Supremacy Clause, as a *non obstante* clause, dispels the notion that Congress intends not to displace state law through its enactment of the relevant federal law. *Id.* at 290–303.

the express, field, and impossibility branches all involve logical contradictions.¹⁷⁷ This is in sharp contrast with Gardbaum's supremacy test, whereby the Supremacy Clause warrants only conflict preemption, and perhaps, he suggests, only the impossibility component of conflict preemption, because under Gardbaum's conception of consistency, only impossibilities involve actual contradictions.¹⁷⁸ That is, for Gardbaum, viewing the Supremacy Clause as a guarantee of federal-state consistency requires justifying express and field preemption (and perhaps obstacle preemption) through other constitutional provisions besides the Supremacy Clause,¹⁷⁹ but Nelson, through a more expansive understanding of what constitutes a logical contradiction in the preemption context, argues almost the polar opposite—that express, field, and impossibility preemption, but not obstacle preemption, involve logical inconsistencies and therefore can be justifiably preserved as part of preemption doctrine under his “logical contradiction” test.¹⁸⁰

Given that both scholars derive their doctrinal prescriptions from the same premise—that the Supremacy Clause requires only a federal-state consistency in the preemption context—their conclusions raise an important question: Why do they differ in how to effectuate that consistency through an actual doctrinal test? The problem is that both scholars endorse a theory of legal consistency without exploring and clarifying the meaning of consistency as applied to legal norms. Indeed, whereas Gardbaum equates the Supremacy Clause with consistency, raising the question of what consistency means in this context, Nelson takes the next step of equating consistency with the law of non-contradiction in formal logic, only to raise the question of what it means for legal norms to contradict each other as a logical matter. If we want to reconceptualize preemption to turn on consistency, we have to be much more explicit about how we are conceptualizing consistency.

As a result, as persuasive as Gardbaum's argument is for arguing that preemption is not warranted by the Supremacy Clause to the extent it deals with non-conflicting federal and state laws, his argument does not cash out doctrinally unless he can tell us precisely what it means for federal and state law to be consistent with one another. Likewise, as powerful as Nelson's argument is for adopting a “logical contradiction” test, an argument that has converted several Justices to “Calebism,” in Rick Hills's

¹⁷⁷ *Id.* at 261 (stating that logical contradiction test includes “conflict,” “express,” and “field” preemption).

¹⁷⁸ See Gardbaum, *Nature of Preemption*, *supra* note 14, at 772–73. It should be noted that Gardbaum agrees with Nelson that the presumption against preemption should be eliminated because it does not fit with viewing the Supremacy Clause as a federal-state consistency guarantee, nor does it seem warranted by any other constitutional provisions. Gardbaum, *Congress's Power*, *supra* note 14, at 63.

¹⁷⁹ Gardbaum, *Congress's Power*, *supra* note 14, at 60–61. Recall that Gardbaum believes that this Necessary and Proper Clause argument can and should succeed only as applied to express preemption. *Id.* at 52–54.

¹⁸⁰ Nelson, *supra* note 2, at 261.

words,¹⁸¹ Nelson's test cannot render preemption cases more principled and predictable unless he can more fully articulate what it means for two laws to contradict each other logically as opposed to practically. Indeed, ignoring the rather large and important scholarship on this distinction between logical and practical contradictions,¹⁸² Nelson assumes in his definition of his logical contradiction test—and throughout his article on preemption—that practical contradictions are the same as logical contradictions,¹⁸³ thereby enabling him to preserve much of the Court's preemption framework, excluding only obstacle preemption from the four branches. This makes Nelson's approach much more similar to functional proposals than scholars and judges have acknowledged, as we will see in Section II.B.

B. Functionalist Proposals

In his last article before his untimely passing, Professor Dan Meltzer provided the most powerful critique to date of Nelson's logical contradiction test.¹⁸⁴ In that article, Meltzer challenged Nelson's argument principally on the ground that it cannot accommodate for how federal policy is made in our increasingly complicated polity.¹⁸⁵

¹⁸¹ Rick Hills, *Immigration Makes Strange Bedfellows: How Arizona Convinced Scalia and Alito to Embrace the Presumption Against Preemption*, PRAWFSBLAWG (June 27, 2012), <http://prawfsblawg.blogs.com/prawfsblawg/2012/06/immigration-makes-strange-bedfellows-how-arizona-convinced-scalia-and-alito-to-embrace-the-presumption-against-preemption.html> [<https://perma.cc/CX3D-KUZK>]. Indeed, as mentioned in the Introduction, Justice Thomas has adopted Nelson's logical contradiction test as the best way of applying the original meaning of the Supremacy Clause—thereby giving rise to what Daniel Meltzer has dubbed the “Nelson/Thomas” test—and there are signs that the test may soon command a majority, depending on who replaces Justice Scalia. *See supra* notes 21–22 and accompanying text.

¹⁸² As we will see in Part III, Nelson's definition of his logical contradiction test obscures the difference between a practical contradiction (which refers to a conflict of a practical nature in that it involves differently assembled but not necessarily logically contradictory facts) and a logical contradiction (which refers to a conflict of a logical nature in that it formally violates the law of non-contradiction), a distinction at the core of many of the most foundational works in moral and legal philosophy. *See infra* notes 247–51 and accompanying text. For a discussion of how this distinction between practical and logical contradictions lies at the core of Kantian philosophy, see, e.g., Shawn D. Kaplan, *A Critique of the Practical Contradiction Procedure for Testing Maxims*, 10 KANTIAN REV. 112 (2005). Due to Kant's influence on legal thought, this distinction between practical and logical contradictions permeates legal philosophy. *See, e.g.*, HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 375 (Anders Wedberg trans., Lawbook Exch. 2007) (1945) (arguing that “[i]t is one of the main tasks of the jurist to give a consistent presentation of the material with which he deals” and therefore, “[t]he specific function of juristic interpretation is to eliminate these contradictions by showing that they are merely sham contradictions”—i.e., practical rather than logical contradictions).

¹⁸³ *See Nelson, supra* note 2, at 260–61. Although Nelson dubs his test the “logical contradiction” test, and uses the word “logical” fourteen times in his article, he never distinguishes between practical and logical contradictions.

¹⁸⁴ Meltzer, *supra* note 17.

¹⁸⁵ *See id.* at 31–34.

Meltzer focused in particular on defending obstacle preemption,¹⁸⁶ which of course is the primary target of Nelson's argument in that it is the only branch excluded as violating his logical contradiction test.¹⁸⁷ In defending obstacle preemption, Meltzer did not deny the oft-repeated criticism that obstacle preemption, in calling for judges to balance federal and state interests against one another, requires enlarging judicial discretion.¹⁸⁸ While conceding this criticism, Meltzer argued that such discretion is an "inescapable"¹⁸⁹ part of preemption jurisprudence, due to "the limited capacity of the legislature to prescribe, *ex ante*, a specific and comprehensive set of statutory directives."¹⁹⁰ Because Congress simply cannot foresee what laws will be enacted at the state level and what circumstances will arise so as to require preemption, the text of federal statutes cannot control the inquiry.¹⁹¹ According to Meltzer, a court must always engage in a purposive inquiry, whereby the court examines whether its understanding of the federal law's purpose would be undermined by the state law in question because, for Meltzer, it is the job of the courts "to integrate federal legislation with state and local bodies of law so as to craft a working and effective legal order."¹⁹²

Moreover, pointing to the complexity of lawmaking in a horizontally and vertically diffused polity—a complexity that Meltzer experienced firsthand through his work in the Obama Administration¹⁹³—Meltzer rejected Nelson's analogy between repeals and preemption.¹⁹⁴ For Meltzer, repeals and preemption are entirely different doctrines, requiring entirely different notions of consistency, because they operate in vastly different legal contexts, with the repeals doctrine involving the same level of government, and preemption being much more complicated, involving the relationship between the federal government and the fifty state governments, including their many sub-entities.¹⁹⁵

This is a profound argument, with deep implications not just for preemption but for how we think of consistency as a legal concept. Under Meltzer's view, legal consistency is not an abstract logical concept but rather a concrete functional tool, operating

¹⁸⁶ *Id.* at 7.

¹⁸⁷ Nelson, *supra* note 2, at 263.

¹⁸⁸ Meltzer, *supra* note 17, at 7, 42–43.

¹⁸⁹ *Id.* at 7.

¹⁹⁰ *Id.* at 56.

¹⁹¹ *Id.* at 56–57.

¹⁹² *Id.* at 57.

¹⁹³ In 2009, Obama appointed Meltzer as his principal deputy counsel. Charlie Savage, *White House Deputy Counsel Resigns*, N.Y. TIMES: THE CAUCUS (May 7, 2010, 4:40 PM), <http://thecaucus.blogs.nytimes.com/2010/05/07/white-house-deputy-counsel-resigns/> [https://perma.cc/3E6Z-NVNF]. Although Meltzer served in that capacity for only a little more than a year, he was closely involved in many of the Administration's efforts, including being "a player in the White House's effort to shepherd the health care overhaul through Congress[.]" *Id.*

¹⁹⁴ Meltzer, *supra* note 17, at 49.

¹⁹⁵ *Id.* at 51–52.

differently in different legal contexts.¹⁹⁶ Preemption jurisprudence must therefore look to the *function* of the doctrine, and not to any abstract formal commands of logic, in seeking to render a federal system of government that works, an approach that might bear on how we think about related legal doctrines, such as stare decisis, and indeed the rule of law in general.

One would be remiss to overlook the strong jurisprudential and political implications here: Functional critiques tend to come from the left and to favor much of the Court's preemption case law, whereas formalist critiques tend to come from the right and to find the Court's preemption doctrine in need of a massive overhaul.¹⁹⁷ Perhaps not surprisingly, when functionalist critiques have sought to reform the Court's preemption framework, they have taken aim at the Court's impossibility analysis under conflict preemption, which is of course the core of what scholars like Nelson and Gardbaum seek to preserve by equating the Supremacy Clause with consistency.¹⁹⁸

A significant problem with these functionalist proposals is that they overlook how, as preemption doctrine has moved further away from the relatively straightforward question of consistency, and toward a more fact-specific approach, the Court's decision-making has become more complicated, more ideological, and consequently, more favorable to displacement of state law, at least when it serves the ideological

¹⁹⁶ See *id.* at 56.

¹⁹⁷ Indeed, most functional critiques are not interested in completely reforming the doctrine, in the way that Gardbaum and Nelson are, but rather in preserving the Court's four-part framework while simply orienting courts toward a more factually driven and pragmatic approach that takes into consideration which types of state policies play a healthy role in our polity and therefore should be preserved. *Id.* at 38 ("Implied preemption doctrine . . . is the means by which . . . the national government can displace state law that 'the legislature would wish to be negated.'" (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 27 (Max Farrand ed., 1911))).

¹⁹⁸ Consider, for example, Professor Leslie Kendrick's recent proposal to eliminate impossibility preemption on the ground that the analysis is excessively formalistic and therefore "impossible" to apply. Leslie Kendrick, *The Impossibility of Impossibility Preemption*, TORTSPROF BLOG (Mar. 17, 2003), <http://lawprofessors.typepad.com/tortsp/2013/03/leslie-kendrick-the-impossibility-of-impossibility-preemption.html> [<https://perma.cc/47KV-ZCFG>] [hereinafter Kendrick, *Impossibility Preemption*]. Kendrick contends that the only way to fix preemption law is to make it "a question not of formalism but of facts on the ground." *Id.* Accordingly, Kendrick's solution to the FDA/tort law conflict is to balance the deterrent benefits of imposing state tort liability on drug manufacturers, against the potential costs that tort liability would impose—namely, how it might "cause drug manufacturers to raise prices to unaffordable levels, stop developing new products, or withdraw from the market entirely." *Id.* Under this proposal, the formal normative content of the relevant federal and state legal prescriptions, and the logical relationship between these prescriptions, would be entirely subordinate to Kendrick's pragmatic cost-benefit analysis. See also Leslie C. Kendrick, *FDA's Regulation of Prescription Drug Labeling: A Role for Implied Preemption*, 62 FOOD & DRUG L.J. 227 (2007).

interests of the majority of the Court.¹⁹⁹ This is why Meltzer's and Leslie Kendrick's proposals are so problematic: Proposals to make preemption law even more functional and less formalistic would only exacerbate this problem.

This should not be a political issue. Both liberals and conservatives alike should be concerned about the Court continuing its functionalist approach to preemption, given the doctrinal chaos and ideological conflict it has yielded in this area of law. At this point, both sides have experienced the drawbacks of such an approach. The solution is not to expand judicial discretion further, as Professors Meltzer and Kendrick prescribe. The solution is rather to move preemption in the opposite direction: to expurgate such fact-driven policy concerns from the preemption framework and develop a stronger theory of how to make preemption better work as a guarantee of consistency between federal and state law. Part III will seek to develop such a solution.

III. MY PROPOSAL: PREEMPTION AS A CONSISTENCY DOCTRINE

My proposal will consist of four different steps. Section III.A will build on Professor Nelson's argument that preemption is analogous to repeals doctrine; this Section will argue more broadly that preemption is one of many legal doctrines designed to ensure systemic consistency—what I will call “consistency doctrines.” Section III.B will argue that because these consistency doctrines require a theory of consistency, we can understand the four branches of preemption more broadly in terms of different *theories* of consistency, theories that have appeared in other debates over consistency doctrines. Section III.C, drawing from other consistency doctrines, as well as works in formal logic, will argue why one particular conception of consistency—a normative conception—is the best fit for preemption doctrine. Finally, Section III.D will derive the following preemption test from literature on when legal norms impose conflicting obligations: Courts must rule that federal law displaces state law if, and only if, the normative content expressed in the federal and state laws impose conflicting obligations—either through legal prohibitions, requirements, or rights—on legal subjects.

A. The Three Modalities of Legal Consistency

As Caleb Nelson has so insightfully observed, preemption operates like statutory repeals and is therefore not unique in law.²⁰⁰ What Nelson has overlooked, however, is that this goes beyond the repeals doctrine. Preemption and repeals are what I will call “consistency doctrines”—any legal doctrine designed to create systemic consistency. We can break consistency doctrines into three modalities of legal consistency—turning on *when* the laws were passed, *who* passed the laws, and *what* types of laws are at

¹⁹⁹ See *supra* Section I.B.5.

²⁰⁰ See Nelson, *supra* note 2, at 231.

issue. I will therefore call these the *temporal*,²⁰¹ *institutional*,²⁰² and *typological*²⁰³ modalities of legal consistency. Below is a table featuring the three types of consistency modalities, alongside some of the most significant consistency doctrines falling under these modalities.

Temporal Modality	Institutional Modality	Typological Modality
Repeals Doctrine	Preemption Doctrine	The <i>Marbury</i> Doctrine
Horizontal Stare Decisis	Vertical Stare Decisis	The <i>Chevron</i> Doctrine

Notice how these are all versions of the same problem: They all involve sorting out how a legal system should deal with rules violating other rules within the same system. In most areas of law, we think of specific *actions* as violating legal rules. For example, to determine whether I violated the speed limit by committing the act of driving over 65 MPH, we simply need a theory of how that particular rule (no driving over 65 MPH) should apply to the facts (I drove over 65 MPH). A related, but slightly different, legal question arises when legal rules violate other legal rules within the same system. In seeking to resolve such conflicts, these consistency doctrines all raise the same question: What does it *mean* for two laws to be inconsistent with one another, so that one rule prevails over the other? All consistency doctrines therefore require *conceptions* or *theories* of what constitutes a contradiction between rules.

²⁰¹ Temporal consistency doctrines reconcile conflicts between norms issued by the same institution at different times. This is a *when* issue: One law prevails over another because of the time when it was passed. In the legislative sphere, conflicts between statutes passed at different times are resolved through the canons of construction dealing with repeals—specifically, *leges posteriores priores contrarias abrogant* (the “last in time” rule). *See, e.g., Radzower v. Touche Ross & Co.*, 426 U.S. 148, 160 n.3 (1976) (Stevens, J., dissenting). Conflicts between judicial decisions issued at different times within the same court are resolved through horizontal stare decisis. *See generally* Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787 (2012) (providing an overview of the doctrine of horizontal stare decisis).

²⁰² Institutional consistency doctrines reconcile conflicts between norms issued by institutions situated differently within a legal system’s hierarchy. This is a *who* issue: One norm prevails over another due to the entity or institution responsible for its promulgation. Preemption and vertical stare decisis are two examples of doctrines that resolve conflicts based on institutional authority.

²⁰³ Typological consistency doctrines reconcile conflicts between norms situated differently within the typology of law, regardless of what institution adopted the respective legal norms. This is a *what* issue: One norm prevails over another, not necessarily because the federal government issued it, but because of what type of law it is. For example, under the *Marbury* doctrine, the U.S. Constitution prevails over federal statutes and treaties, and under the *Chevron* doctrine, both of these forms of federal law prevail over federal administrative regulations. For further discussion of the relationship between *Chevron* and *Marbury*, see PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 309–21 (2014).

B. The Four Preemption Branches as Four Conceptions of Consistency

The four preemption branches reflect four different theories of consistency that can apply to any consistency doctrine. One, we could have a *normative* conception of consistency—i.e., one that looks only to whether the normative content inhering in the conflicting rules pulls an agent in opposing directions. Two, we can have a *purposive* conception of consistency—i.e., one that looks to whether the purpose of the superior authority’s rule would be undermined by the inferior authority’s rule. Three, we can have a *jurisdictional* conception of consistency—i.e., one that considers whether the authority of a sovereign’s control within a particular category of regulation would be compromised through another sovereign’s presence in that area. Finally, we can have an *intentional* conception of consistency—i.e., one that considers only the intent of the superior sovereign in determining how to deal with that particular conflict. These distinctions among the different types of consistency are significant because, as we will see in Section III.C, only the first type, the normative conception of consistency, can be subject to formal logic’s law of non-contradiction. Whereas norms can contradict one another logically, by pulling an agent in opposing directions, that is not the case for purposes,²⁰⁴ jurisdictions,²⁰⁵ and intentions.²⁰⁶ Therefore, if we want to apply the law of non-contradiction to ensure that the system is consistent, we will want to look only to the content of the norms. To illustrate how these conceptions of consistency relate, let us step back from the preemption context and see how the different theories apply to religious-liberty disputes, which require a consistency doctrine because these disputes raise the institutional modality in that they involve two competing institutions: a religious body and the government.²⁰⁷

²⁰⁴ Indeed, we say that purposes hang or fit together, to form a coherent whole, but if they fail to cohere, they do not necessarily contradict one another as a logical matter. Some scholars therefore refer to this purposive consistency as “normative coherence,” which is of a functional nature, as distinct from “normative consistency,” which is of a logical nature. Neil MacCormick, *Coherence in Legal Justification*, in *THEORY OF LEGAL SCIENCE* 235, 235 (Aleksander Peczenik et al. eds., 1984).

²⁰⁵ If encroaching on another sovereign’s jurisdiction violated the law of non-contradiction, then it would also be the case that state violations of the Dormant Commerce Clause constitute not just legal violations but logical contradictions as well. Conversely, the federal government’s violations of the Tenth Amendment would also constitute logical contradictions by entering the state’s exclusive field. And the same for congressional usurpations of executive authority: They would not simply be violations of the separation of powers but also logical contradictions.

²⁰⁶ Intentions do not logically contradict one another if the intentions do not form the content of a norm. For example, if Congress says it has intent *X* through *Y* law, and a state legislature says it intends to defeat Congress’s intent by enacting the same law, there is no contradiction because the norm will require the same action of any agent subject to the two laws. That the state legislature intended to contradict Congress by enacting the law does not mean that there is a contradiction. The intent does not matter. All that matters, in terms of there being a contradiction, is what the applicable norms actually require.

²⁰⁷ Indeed, the command to “render to Caesar the things that are Caesar’s, and to God the things that are God’s[.]” attributed to Jesus in *Matthew 22:21* (ESV), can be understood as

1. Example One: Church-State Law and Consistency Conceptions

Just as preemption doctrine makes the federal government the institutionally superior sovereign whose norms prevail over contrary norms issued by inferior sovereigns (the states), the Court's pre-*Employment Division, Department of Human Resources of Oregon v. Smith*²⁰⁸ interpretation of the Free Exercise Clause,²⁰⁹ and its post-*Smith* interpretation of the Religious Freedom Restoration Act (RFRA)²¹⁰ make a person's religious beliefs the institutionally superior sovereign in the event of an inconsistency between those beliefs and a law.²¹¹ More specifically, to trigger strict scrutiny under the pre-*Smith* Free Exercise Clause, and now under RFRA, the religious individual bringing the suit must show that her religious beliefs were "substantially burden[ed]" by the law being challenged.²¹² This standard is a consistency doctrine because it means that, for strict scrutiny to apply, the individual must show a certain type of inconsistency between her beliefs and the law. The "substantial burden" test thus raises the question, analogous to the one raised in preemption cases, of what it means for two things to contradict each other, such that the norm issued by the superior sovereign (the religious belief) displaces the norm issued by the inferior sovereign (the government).

Which conception of consistency has the Court employed in church-state law? Overwhelmingly, the Court has applied a *normative* conception, holding that under the pre-*Smith* understanding of the Free Exercise Clause, and under the text of RFRA, strict scrutiny applies if, and only if, some norm in her religion requires the performance or non-performance of some act that the challenged law forbids or

a consistency doctrine—i.e., as a way to reconcile the norms of two overlapping but independently sovereign systems.

²⁰⁸ 494 U.S. 872 (1990) (holding that the Free Exercise Clause did not prohibit the application of an Oregon drug law and thus the state could deny claimants unemployment compensation based on drug-related misconduct).

²⁰⁹ U.S. CONST. amend. I.

²¹⁰ RFRA was passed in 1993 to restore the Court's pre-*Smith* religious-liberty standard, in light of Congress's disapproval of the *Smith* decision. *City of Boerne v. Flores*, 521 U.S. 507, 512–16 (1997). In *City of Boerne v. Flores*, the Court invalidated RFRA as applied to the states, for exceeding Congress's Article I and Fourteenth Amendment Section 5 powers. *Id.* at 536. But the Court has since affirmed that RFRA reinstates the pre-*Smith* standard as applied to the federal government. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 134 S. Ct. 2751, 2760–61 (2014) (holding that RFRA prohibited the contraceptive mandate under the Affordable Care Act as applied to a for-profit corporation because the mandate imposed a substantial burden on its closely held shareholders, and the mandate did not satisfy RFRA's least-restrictive means requirement); *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 430–37 (2006) (holding that RFRA prohibited the federal government from banning a religious sect's use of *hoasca* because the ban imposed a substantial burden on the sect, and the federal government lacked a compelling interest in the ban so as to justify that substantial burden).

²¹¹ *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (stating that the only justification for an individual's constitutional right of free exercise is the government's compelling state interest in preventing the action).

²¹² *Hobby Lobby*, 134 S. Ct. at 2767 (quoting Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1(a), b (2012)).

requires.²¹³ A good example of the Court's application of this normative conception is *Lyng v. Northwest Indian Cemetery Protective Ass'n*,²¹⁴ where the Court held that the federal government's decision to build a road through the Chimney Rock area of the Six Rivers Forest did not violate the Free Exercise Clause, even though the road "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples."²¹⁵ The Court's principal reason for rejecting this claim—despite the powerful, empathic reasons favoring the claimants—was that the federal government's building of the road would not *prohibit* the claimants from following any norms required of their religion.²¹⁶ To be sure, the destruction of this forest would make it more *difficult* for these Native Americans to practice their religious beliefs.²¹⁷ But it would not make it *impossible* for them to do so.²¹⁸ In other words, the Court was adopting a *normative* conception of consistency, whereby a person's religious beliefs can displace her obligation to follow the law if, and only if, the person's religious beliefs and the controlling legal commands impose conflicting normative obligations. Because this was not the case here, the Court rejected the claim.

In applying the substantial burden standard in this way, the *Lyng* Court resoundingly rejected competing conceptions of consistency. Indeed, while acknowledging that its precedents, such as *Sherbert*, had invalidated laws that had simply imposed financial burdens on religious exercise, the Court explained that these cases "cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions."²¹⁹ Whereas a tax penalty or denial of government benefits can constitute a substantial burden on religious exercise under a normative conception of consistency, because these specific financial burdens amount to normative prohibitions on specific conduct,²²⁰ the government's destruction of a forest used for religious rituals does not impose a substantial burden on religious

²¹³ As the Court explained in *Sherbert v. Verner*, the Court's canonical formulation of the "substantial burden" standard, the government imposes a substantial burden on religious belief when it "forces [an individual] to choose between [1] following the precepts of her religion and forfeiting [government] benefits . . . and [2] abandoning one of the precepts of her religion [to obtain these benefits.]" 374 U.S. at 404. That is, there is a substantial burden when a religious norm obligates a person to do precisely what the government obligates the same person not to do (or vice versa).

²¹⁴ 485 U.S. 439 (1988).

²¹⁵ *Id.* at 442 (internal quotation marks omitted).

²¹⁶ *Id.* at 451–52.

²¹⁷ *Id.* at 451.

²¹⁸ *See id.* at 452.

²¹⁹ *Id.* at 450–51.

²²⁰ *See Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (holding that "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties").

exercise because it does not prohibit anything that the religion requires or vice versa.²²¹ In holding that obstructing the functioning of a religious belief does not mean that the government has imposed a substantial burden on that belief, the Court implicitly rejected a purposive conception of consistency. Likewise, the Court has rejected efforts to use a jurisdictional conception, in which the Free Exercise Clause or RFRA would create a complete barrier to the government's entry into a religious domain,²²² and the Court has also repudiated an intentional conception by holding that it is the content of the norms themselves, rather than the expressed will of the religious believer, that governs the analysis.²²³

As the church-state context illustrates, a standard way of looking at consistency in law is in terms of a normative conception. This does not mean, however, that the other conceptions are not coherent ways of looking at consistency; to the contrary, these other conceptions are entirely sensible and reasonable ways of looking at the relationship between competing norms. But it may mean that these other conceptions do not fit as well with how consistency doctrines operate in our legal system. To illustrate how broadly the normative consistency conception runs through our legal system, let us consider briefly one more consistency doctrine, *stare decisis*.

2. Example Two: *Stare Decisis* Doctrine and Consistency Conceptions

As mentioned above, horizontal *stare decisis* raises the temporal consistency modality (with later decisions overruling earlier, inconsistent decisions). Just as in preemption, there is a dispute in *stare decisis* over whether the consistency required is

²²¹ *Lyng*, 485 U.S. at 451 (“The crucial word in the constitutional text is ‘prohibit.’” (quoting U.S. CONST. amend. I)).

²²² Indeed, when the Court has found jurisdictional barriers to governmental entry into a religious domain, it has been through the separation of religion and government under the Establishment Clause, not the guarantee of religious liberty under the Free Exercise Clause. See generally Gregory A. Kalsheur, S.J., *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL RTS. J. 43, 55–69 (2008). Indeed, the Court has assiduously avoided finding that religious liberty requires such categorical barriers and has instead interpreted religious liberty to turn on the consistency between government enactments and individual beliefs.

By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. ___, 132 S. Ct. 694, 706 (2012).

²²³ Cf. *Bowen v. Roy*, 476 U.S. 693, 699 (1986) (finding no substantial burden in the government's assignment and use of a Native American child's Social Security number because, although the Court accepted the sincerity of the father's belief that “use of [his daughter's Social Security] number may harm [her] spirit[,]” the government's use “place[d] [no] restriction on what [the father] may believe or what he may do”).

of a functional or formal nature.²²⁴ Indeed, whereas in the preemption context a functional approach asks whether the state law would pose an obstacle to the effectuation of the federal purpose, in the stare decisis context a functional approach likewise inquires whether “the decision poses a direct obstacle to the realization of important objectives embodied in other laws[.]”²²⁵ And just how the formal approach in the preemption context turns on whether it would be impossible to follow both federal and state laws, a formal approach in the stare decisis context turns on whether “the later law has rendered the [prior judicial] decision irreconcilable with competing legal doctrines or policies[.]”²²⁶ Although there certainly are instances in which functional conception of consistency has been employed in stare decisis, the overwhelming tradition of the practice and theory of stare decisis is for the deciding court to look only at the *content* of the precedent decision to determine what norm would apply to the current case and whether the deciding court’s preferred ruling would contradict that norm.²²⁷

This is what distinguishing a case, so as not to overrule the precedent, is based on—the notion that the current ruling does not require something that the previous ruling forbids, so that the two can jointly exist without requiring the trumping of one over the other. In other words, if a judge can comply with both rulings, stare decisis requires the preservation of both norms. When such joint compliance is not possible, however, then in the case of horizontal stare decisis the court must overrule the precedent decision,²²⁸ and in the case of vertical stare decisis the court must follow the precedent, so as not to rule according to what it believes to be the correct view of the law.²²⁹

Again, that stare decisis follows a normative consistency conception does not necessarily mean that preemption law *must* also follow this approach to consistency. But if we want a principled system, whereby preemption is governed by the same conception of consistency prevailing in other areas of law, so that judges are not simply picking and choosing when to displace state law on an ad hoc basis, the judicial

²²⁴ See, e.g., Stephen R. Perry, *Judicial Obligation, Precedent, and the Common Law*, 7 OXFORD J.L. STUD. 215, 240 (1987).

²²⁵ See *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (citations omitted), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004).

²²⁶ *Id.* at 174.

²²⁷ See, e.g., Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 17–19 (1989) (articulating a model of precedent where formal rules require future conformity by other courts).

²²⁸ That is, the court must overrule itself if the standard that the court has imposed on itself for overruling decisions has been satisfied. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992) (plurality opinion). But the threshold question, before that standard is even an issue, is whether the purportedly correct ruling in the present case would *require* following a legal norm that would have been *forbidden* by the precedent case.

²²⁹ This is of course because vertical stare decisis is an absolute command, always requiring a lower court to follow the precedent of a higher court, regardless of its consistency with what the lower court believes the law would require without that precedent. See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application . . . the Court of Appeals should follow the case which directly controls[.]”).

practices in *stare decisis* and church-state law provide powerful arguments for treating preemption accordingly. An additional reason lies in the relationship between normative consistency and formal logic, a point alluded to above but that will be explored in greater depth in Section III.C.

C. Normative Consistency and Deontic Logic

Professor Michael Steven Green asked, almost ten years ago now, “Why don’t American philosophers of law talk about deontic logic?”²³⁰ The neglect of deontic logic (the species of formal logic dealing with norms) in legal theory is certainly puzzling.²³¹ Even more puzzling, however, is this neglect in preemption scholarship. That is, why has Professor Nelson, in developing his logical contradiction test, entirely ignored the precise form of logic designed to apply the law of non-contradiction to norms? Moreover, why have all of the commentators on his test made this same mistake? Below, we will seek to fill this void.

There are many versions of deontic logic,²³² but under the logical scheme that most deontic logicians follow, there are five deontic modalities or statuses.²³³ Most deontic logicians define these five modalities according to their relationship to the *obligation* modality, making the obligation modality what logicians call the “basic operator.”²³⁴ From these five modalities, logicians have derived the following foundational theorem of deontic logic: It is not the case that an agent can be obligated to

²³⁰ Michael Steven Green, *Why No Deontic Logic?*, PRAWFSBLAWG (Oct. 12, 2007, 4:50 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2007/10/why-no-deontic-.html> [<https://perma.cc/VS45-H5CC>].

²³¹ Over the last several years, however, there have been some applications of deontic logic to law. *See, e.g.*, PABLO E. NAVARRO & JORGE L. RODRÍGUEZ, *DEONTIC LOGIC AND LEGAL SYSTEMS* (2014).

²³² Here, I will rely principally on Paul McNamara’s excellent essay on deontic logic in the Stanford Encyclopedia of Philosophy. *See* Paul McNamara, *Deontic Logic*, STAN. ENCYCLOPEDIA PHIL. (Feb. 6, 2006), <http://plato.stanford.edu/entries/logic-deontic/> [<https://perma.cc/96FD-82W7>] (substantive revision Apr. 21, 2010). For an introduction to deontic logic, see Dagfinn Føllesdal & Risto Hilpinen, *Deontic Logic: An Introduction*, in BLACKWELL GUIDE TO PHILOSOPHICAL LOGIC 1–35 (Risto Hilpinen ed., 1971). The foundational work on the subject is GEORG HENRIK VON WRIGHT, *NORM AND ACTION: A LOGICAL ENQUIRY* (1963).

²³³ *See* Paul McNamara, *Making Room for Going Beyond the Call*, 105 MIND 415, 418–19 (1996). The five deontic modalities are: (1) it is obligatory that (represented as OB), (2) it is permissible that (represented as PE), (3) it is impermissible that (represented as IM), (4) it is omissible that (represented as OM), and (5) it is optional that (represented as OP). McNamara, *supra* note 232, § 1.2.

²³⁴ McNamara, *supra* note 232, § 1.2. That is, an act is: (1) permissible if, and only if, there is not an obligation not to do that thing ($PEp \leftrightarrow \sim OB\sim p$), (2) impermissible if, and only if, there is an obligation not to do that thing ($IMp \leftrightarrow OB\sim p$), (3) omissible if, and only if, there is not an obligation to do that thing ($OMP \leftrightarrow \sim OBp$), (4) optional if, and only if, there is neither an obligation to do that thing, nor an obligation not to do that thing ($OPp \leftrightarrow (\sim OBp \& \sim OB\sim p)$). *Id.*

perform an action and obligated not to perform that same action.²³⁵ In legal discourse, if an agent is obligated to perform an action, we generally say that an act is *required*, and if an agent is obligated not to perform that action, we generally say an act is *forbidden*; so, applied to law, this theorem of deontic logic simply says that a legal system cannot require and forbid the same act. This “no conflicting obligations” theorem forms the core of what it means for norms to be consistent with one another.²³⁶

One of the more fascinating features of this foundational theorem of deontic logic is that, long before the formal advent of deontic logic, many legal philosophers, such as Bentham,²³⁷ Kant,²³⁸ and Kelsen,²³⁹ had intuited it as forming the bedrock of

²³⁵ This is represented as $\sim(\text{OB}p \ \& \ \text{OB}\sim p)$. *Id.* § 1.4. For the proof, see *id.* § 1.4 n.9.

²³⁶ McNamara, *supra* note 233, at 419; see also Lars Lindahl, *Conflicts in the Systems of Legal Norms: A Logical Point of View*, in COHERENCE AND CONFLICT IN LAW 39 (Bob Brouwer et al. eds., 1992).

²³⁷ That Bentham, the father of legal positivism in many ways, found a requirement of logical consistency as inherent to a legal system is quite striking, and has been overlooked by many legal theorists. But indeed, Bentham made such an argument in his *Of Laws in General*, which, despite its significance, has been largely ignored, partly because for more than 150 years it remained unpublished, as it lay among 172 boxes of manuscripts that Bentham left to University College, London, upon his death in 1832. H.L.A. HART, *Bentham's Of Laws in General*, in ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 105, 107 (1982). Bentham's literary executor, Sir John Bowring, had overlooked the manuscript, and it was not discovered until the 1940s. *Id.* Charles Everett, of Columbia University, was responsible for resuscitating the work and eventually publishing an edited version in 1945. *Id.* Hart found this work of Bentham's exceptionally important, even going so far as to claim that, had it been published in Bentham's lifetime, it would have been Bentham, rather than his student, John Austin, who would have become known as the founder of analytical legal philosophy. *Id.* at 108. One of the most important features of *Of Laws in General* is Bentham's effort to create a new terminology capturing the linguistic resources available to a legislative body. See *id.* at 106–07. In doing so, he identified three distinct types of legal norms—*command*, *prohibit*, and *permit* norms—and applied the law of non-contradiction to these norms to derive the theorem that a legal system cannot command and prohibit the same act. *Id.* at 112–14. For an excellent discussion of Bentham's contributions to deontic logic, see LARS LINDAHL, POSITION AND CHANGE: A STUDY IN LAW AND LOGIC 3–21 (1977).

²³⁸ See, e.g., IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS: WITH ON A SUPPOSED RIGHT TO LIE BECAUSE OF PHILANTHROPIC CONCERNS 6:223 (James W. Ellington trans., 3d ed. 1993) (1785) (questioning the notion of “permissive laws,” as opposed to “laws that command and prohibit,” because law means duty and “[a]n action that is neither commanded nor prohibited is merely *permitted*, since there is no law limiting one's freedom (one's authorization) with regard to it, and so too no duty”).

²³⁹ In particular, Kelsen held that “[j]ust as it is logically impossible to assert both ‘A is,’ and ‘A is not,’ so it is logically impossible to assert both ‘A ought to be’ and ‘A ought not to be.’” KELSEN, *supra* note 182, at 374–75; see also HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992) (1934). For a rebuttal of Kelsen's argument against conflicting obligations, see LON FULLER, THE MORALITY OF LAW 66 (2d ed. 1969) (claiming that if a legal system consisted of conflicting obligation norms, the legal system would fail as a moral matter because it would fail “to build up a system of rules for the governance of . . . conduct,” but in failing

all legal systems. For our purposes here, their legal intuitions are just as important, and perhaps even more important, than the elaborate proofs that logicians have used to derive this theorem from deontic axioms. The intuitions of such legal luminaries powerfully signify that a rule against conflicting obligations lies at the core of how we conceive of and effectuate consistency in law.

With this background in deontic logic and its “no conflicting obligations” theorem covered, we can now see more clearly what this all has to do with preemption, and indeed consistency doctrines in general. If we apply this theorem to preemption,²⁴⁰ we get exactly what the Court’s direct conflict test holds: The same act must be required and prohibited for there to be a physical impossibility, and therefore preemption, under this test.²⁴¹ And indeed, just as Bentham, Kant, and Kelsen intuited this theorem

in this moral endeavor, the legal system would not “have trespassed against logic”); see also H.L.A. HART, *Kelsen’s Doctrine of the Unity of Law*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 309 (1983).

²⁴⁰ We should note here that although there is significant debate among moral philosophers and logicians on the challenges of applying this theorem of deontic logic to normative systems, none of these challenges is applicable to its application in preemption law, because unlike in moral systems, our legal system has a specific provision, the Supremacy Clause, telling us exactly how to deal with conflicts—that is, the Supremacy Clause makes every state law a defeasible obligation, subject to displacement if it contradicts a federal law. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 327 (1819) (“The laws of the United States, then, made in pursuance of the Constitution are to be the supreme law of the land, anything in the laws of any State to the contrary notwithstanding.”). That is arguably not the case with moral systems. Edward John Lemmon famously challenged the conflicting-obligations theorem on this ground. See E. J. Lemmon, *Moral Dilemmas*, 71 *PHIL. REV.* 139, 148–50 (1962). To illustrate Lemmon’s criticism, McNamara offers the following conflict between (1) “It is obligatory that I now meet Jones (say, as promised to Jones, my friend)” and (2) “It is obligatory that I now do not meet Jones (say, as promised to Smith, another friend).” McNamara, *supra* note 232, § 4.4. McNamara points out that these two propositions create a logical contradiction under standard deontic logic; indeed, the propositions violate the basic theorem that there cannot be an obligation to perform *x* action and not perform *x* action. *Id.* The problem, however, is that such conflicts are pervasive in normative systems and they “hardly seem[] logically incoherent.” *Id.* The most famous example is of course Sartre’s essay, *Existentialism Is a Humanism*, where Sartre used one of his students as an example of how we must choose our moral commitments, because they are not given to us by nature. Jean-Paul Sartre, *Existentialism Is a Humanism*, in *EXISTENTIALISM FROM DOSTOEVSKY TO SARTRE* 287–311 (Walter Kaufmann ed. & trans., Meridian Books 1956). According to Sartre’s telling of the story, the student felt obligated by his sense of morality to join the Free French Forces in England in hopes of freeing his country from Nazi rule and avenging the death of his elder brother, whom the Nazis had killed in the 1940 invasion of France. *Id.* at 295–96. But the student also felt obligated by his sense of morality to stay in France with his mother, who, after being abandoned by the father and losing her oldest son in the war, depended on the student as her sole source of comfort and happiness. *Id.* The student thus felt both required and forbidden to go to England to join the Forces, and both required and forbidden to stay in France to care for his mother. *Id.*

²⁴¹ The paradigmatic example is of course from *Florida Lime & Avocado Growers v. Paul, Inc.*, where the Court first announced the impossibility test in explaining that there

without the formal axioms of deontic logic, many legal scholars and judges have done the same with preemption law. As mentioned above, Professor Gardbaum intuited the notion that the impossibility analysis is the only preemption test warranted by viewing the Supremacy Clause as a guarantee of federal-state consistency because “the general concept of a ‘conflict of laws’ suggests that irreconcilability or contradiction and not mere interference is necessary before a state law is displaced.”²⁴² Here, Gardbaum, without any explanation beyond the quoted passage, argued that only a conflict of obligations constitutes a “contradiction” in the preemption context.

Even scholars adopting a more functional approach have slipped into this way of thinking about legal contradictions. Consider, for example, Laurence Tribe’s excellent presentation of preemption law, as it stood in 1988, in his influential treatise, *American Constitutional Law*.²⁴³ In explaining why the Supreme Court has developed obstacle preemption, Tribe wrote,

[S]tate and federal laws need not be contradictory on their face for the latter to supersede the former: there are more subtle forms of actual conflict. Even if state action does not go so far as to prohibit the very acts that federal government requires (or vice versa), it may nonetheless be struck down if it is in “actual conflict” with narrow objectives that underlie relevant federal enactments.²⁴⁴

By equating obligation conflicts with contradictions, and using scare quotes to signify that purposive conflicts are not quite “actual conflicts,” Tribe seemed to be taking the position that only obligation conflicts—i.e., in preemption parlance “impossibility conflicts”—amount to logical contradictions in preemption law.²⁴⁵ That someone like Hans Kelsen, a strong formalist, would take such a position on legal consistency is not a surprise, but that Tribe, a liberal realist who has specifically argued against applying logical commands to law,²⁴⁶ would make such an argument signifies just how deeply rooted this notion is in our concept of law.

Turning back to Nelson’s logical contradiction test, we can now see a major flaw in his use of logic to describe how his test works. Without directly engaging

would be preemption “if, for example, the federal orders forbade the picking and marketing of any avocado testing more than 7% oil, while the California test excluded from the State any avocado measuring less than 8% oil content.” 373 U.S. 132, 143 (1963).

²⁴² Gardbaum, *Congress’s Power*, *supra* note 14, at 63–64.

²⁴³ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988).

²⁴⁴ *Id.* § 6-26, at 482 (footnote omitted).

²⁴⁵ *See id.* § 6-26, at 482 n.8.

²⁴⁶ *See generally* LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 24 (1991) (“The notion that the Constitution embodies an immanent, unitary, changeless set of underlying values or principles . . . seems an extraordinary intellectual conceit . . .”).

with deontic logic literature—or any literature on logic for that matter—Nelson argues that federal-state conflicts that do not create conflicting obligations nevertheless create logical contradictions.²⁴⁷ For example, going against the current of what many of our greatest legal minds have said about legal consistency, Nelson argues throughout his article that if state law authorizes *X* action, and federal law prohibits that action, then there is a logical contradiction.²⁴⁸ Although this prohibition-permission conflict would not seem to create a logical contradiction, given that a legal subject could follow both the federal and state laws by simply not engaging in the action authorized under state law, such a scenario might present a practical contradiction, or what von Wright referred to as “*Sysphos-orders*,” in that the state authorization would undermine the federal prohibition, as was the case with Zeus’s dueling but not contradictory orders to Sisyphus.²⁴⁹ In the parlance of the Court’s preemption doctrine, a state permission norm that undermined but did not directly conflict with a federal prohibition norm would be preempted, but not under the Court’s direct conflict analysis, but rather under the Court’s indirect conflict analysis.²⁵⁰ Nelson’s argument about applying his logical contradiction test to permission-prohibition conflicts therefore includes precisely the type of practical conflicts that logicians and legal theorists have found not to be of a logical status, but of a *functional* status—which is, ironically, precisely the type of conflict that Nelson seeks to exclude from his preemption framework.

²⁴⁷ Nelson, *supra* note 2, at 261.

²⁴⁸ For example, Nelson states the following rule:

If state law purports to authorize something that federal law forbids or to penalize something that federal law gives people an unqualified right to do, then courts would have to choose between applying the federal rule and applying the state rule, and the Supremacy Clause requires them to apply the federal rule.

Id. Likewise, Nelson offers the following hypothetical: “Imagine, for instance, that a valid rule of federal law gives workers the right to join a labor union (subject to certain qualifications), while state law purports to prohibit all union membership.” *Id.* Because it would be “physically possible for workers to comply with both laws by refraining from joining a union[,]” his hypothetical set of laws would satisfy the Supreme Court’s direct conflict test. *Id.* Nevertheless, he concludes, this conflict would violate the “logical contradiction” test, because “[a] court that enforced the state-law prohibition would be ignoring the federal-law right.” *Id.*

²⁴⁹ VON WRIGHT, *supra* note 232, at 147. Indeed, although Zeus seemed to contradict himself by commanding Sisyphus to roll the boulder up the hill while also commanding the boulder to roll down the hill each time before Sisyphus could reach the top, these commands were not actually contradictory, *as a logical matter*, because these commands operated at different times. The dueling commands rendered Sisyphus’s compliance inefficacious, but the commands were nonetheless logically consistent, because it was *possible* to comply with the dueling commands. Sisyphus could simply roll the boulder up the hill, and then, once the boulder rolled back down, retrieve it to roll it up again, *ad infinitum*. *See id.*

²⁵⁰ *See* TRIBE, *supra* note 243, § 6-26, at 482 n.7.

To illustrate how Nelson’s application of his logical contradiction test resembles the functional approaches covered in Part II, consider Nelson’s argument challenging the conventional interpretation of *McCulloch* as being a precursor of “obstacle preemption.”²⁵¹ In making this argument, Nelson claims that Maryland’s taxing a bank that the federal government had specifically authorized to act within the state created an actual logical contradiction between federal and state law, thereby violating his logical contradiction test.²⁵² Nelson claims that this conclusion can be reached in two ways—in either “substantive” or “jurisdictional” terms.²⁵³ In finding a “substantive” logical contradiction, Nelson emphasizes how the Court later established in *Osborn v. Bank of the United States*²⁵⁴ that the federal statute at issue in *McCulloch* did not simply create the United States Bank but also “authorize[d] its Banking operations,” such as its issuing of bank notes.²⁵⁵ Under this interpretation of the statute, Nelson concludes that “a state law purporting to prevent the Bank from issuing bank notes (unless it paid a tax on each note or gave the state \$15,000 a year) would contradict this substantive license.”²⁵⁶ Nelson seems to be arguing here that whenever federal law specifically licenses an action, any state impediment imposed on the performance of that action logically contradicts the federal law. Alternatively, Nelson argues, one can find a “jurisdictional” logical contradiction in *McCulloch* by “interpret[ing] the federal statute chartering the Bank to occupy a particular field and to deprive the states of what Marshall called ‘controlling power’ over the Bank’s operations.”²⁵⁷ Here, Nelson seems to be arguing that if federal law authorizes an entity to act within a certain field, then any state law regulating that entity, regardless of the substantive content of the state regulation, creates a logical contradiction with the federal law.

Although it is clear why the former creates a substantive conflict and the latter a jurisdictional conflict, it is not clear why either of these substantive and jurisdictional conflicts amounts to a logical contradiction. Because a law licensing or authorizing an entity does not create an obligation on other parties to honor its existence—an issue we will explore in greater depth shortly in Section III.D—Nelson is wrong in concluding that if we treat Maryland’s tax as “prevent[ing] the Bank from issuing bank notes[,]” the tax “would contradict [the Bank’s] substantive license.”²⁵⁸ The Maryland tax surely would pose an *obstacle* to the Bank’s exercise of its privilege, just

²⁵¹ See Nelson, *supra* note 2, at 266–72.

²⁵² See *id.* at 269–72.

²⁵³ *Id.* at 271. Nelson also considers a third option—that *McCulloch* was decided not on preemption grounds but rather on the “structural principles in the Constitution establish[ing] a doctrine of intergovernmental immunities[.]” *Id.* at 269. But Nelson considers two options for interpreting *McCulloch* as a preemption case. *Id.* at 269–72.

²⁵⁴ 22 U.S. (9 Wheat.) 738 (1824).

²⁵⁵ Nelson, *supra* note 2, at 270 (alteration in original) (quoting *Osborn*, 22 U.S. (9 Wheat.) at 861).

²⁵⁶ *Id.* at 271.

²⁵⁷ *Id.* (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 433 (1819)).

²⁵⁸ *Id.*

as states taxing federal gun permits or federal marijuana licenses would obstruct the exercise of such privileges; for this reason, the Court and commentators have rightfully defended *McCulloch* on the basis of obstacle preemption. But such a tax on a privilege does not pose a *logical* contradiction, and therefore does not warrant preemption under a Supremacy Clause test that tracks the meaning of logical contradictions.

Likewise, Nelson errs in claiming that we can find a jurisdictional logical contradiction in *McCulloch* simply by “interpret[ing] the federal statute chartering the Bank to occupy a particular field and to deprive the states of what Marshall called ‘controlling power’ over the Bank’s operations.”²⁵⁹ Just as Nelson’s substantive conflict argument is essentially an obstacle preemption claim, Nelson’s jurisdictional conflict argument is simply field preemption dressed up as a logical contradiction. If the federal statute at issue in *McCulloch* did indeed “deprive the states of what Marshall called ‘controlling power’ over the Bank’s operations,” then Maryland simply lacked the authority to regulate those operations.²⁶⁰ And this is because of the *content* of the federal statute chartering the Bank, not because of any rule of logic. As mentioned above, a state that acts outside of its authority simply commits a legal violation.²⁶¹ It does not transgress logic in the process.²⁶²

In a sense, however, Nelson’s test does comply with the deontic logic theorem against conflicting obligations. He claims that logical contradictions arise whenever “courts would have to choose between applying the federal rule and applying the state rule, and the Supremacy Clause requires them to apply the federal rule.”²⁶³ In other words, there is a logical contradiction in these instances because courts are required and forbidden to apply both federal and state laws. In this sense, then, Nelson’s conception of what constitutes a contradiction is grounded in deontic logic, though Nelson does not use such terms.

But how can there be a conflict of obligations under such a scenario, when the state law simply permits the conduct that the federal law prohibits, or when the federal law simply occupies the field jurisdictionally? The reason that Nelson is able to frame these scenarios as conflicts of obligations is because Nelson focuses on *courts* as the relevant agents, whereas the customary way of thinking of legal conflicts is in terms of legal *subjects*—i.e., individuals subjected to the law’s commands.²⁶⁴ In

²⁵⁹ *Id.* (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 433).

²⁶⁰ *Id.* (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 433).

²⁶¹ See *supra* note 205 and accompanying text.

²⁶² We should note that Nelson borrows this substantive-jurisdictional distinction from Tribe’s treatise, *TRIBE*, *supra* note 243, § 6-25, at 481, but Tribe clearly did not think that substantive purposive conflicts or jurisdictional conflicts constituted “actual conflicts” or “logical contradictions.” *Id.* The only logical contradictions for Tribe are substantive *normative* conflicts—i.e., conflicts involving state laws that “prohibit the very acts that federal law requires (or vice versa)[.]” *Id.* § 6-26, at 482.

²⁶³ Nelson, *supra* note 2, at 261.

²⁶⁴ Nelson makes this shift explicitly when distinguishing between the Court’s direct conflict standard and his proposed logical contradiction test: “There are plenty of circumstances in which it is physically possible for *individuals* to comply with both state and federal

Section III.D, we will explore how to apply the rule against conflicting obligations to preemption law, focusing in particular on this issue of agency and how to determine when laws impose conflicting obligations on legal subjects.

D. Applying the Rule Against Conflicting Obligations to Preemption Law

The problem with applying Nelson's logical contradiction test to courts is that whenever different federal and state laws apply to the same controversy, courts are subject to competing choices.²⁶⁵ This is because the entirety of federal law is always and necessarily assimilated into state law; indeed, that is the entire point of the Supremacy Clause.²⁶⁶ So courts are always subject to conflicting choices whenever there is any difference, of any magnitude, between applicable federal and state law. Preemption is not designed to remove these conflicts, but only those that compel legal subjects to choose between federal and state law. These are the agents that matter for purposes of creating a consistent legal system.

1. Agency and Conflicting Obligations

Nelson's argument ignores how pervasive such federal-state conflicts are in our system and how the purpose of consistency doctrines is to ensure that legal subjects, as opposed to courts, do not face conflicting commands. For example, *Gonzales v.*

law even though *courts* would have to choose between them—that is, even though state and federal law contradict each other.” *Id.* at 260–61.

²⁶⁵ For example, in his union hypothetical, under which federal law creates a right to join a union and state law prohibits it, an employee can logically satisfy both the federal and state laws “by refraining from joining a union[,]” and therefore the state law should not be preempted under the Court's preemption doctrine. *Id.* at 261. Nelson points out, however, that a court, unlike an employee, would not be able to satisfy both commands, because a court would be compelled to choose between federal and state law in adjudicating a dispute between an employer refusing to permit union organizing and an employee seeking to join a union. *See Nelson, supra* note 2, at 260–61. Because a court would face conflicting obligations, the state law—under Nelson's test, but not under the Supreme Court's impossibility test—would be preempted. A minor quibble with Nelson's point here is that his hypothetical does not actually support his argument. Under his own hypothetical, private agents (employers) *do* face a physical impossibility: Employers are required to permit employees to join unions under the federal law but forbidden to do so under state law. Nelson, however, treats his hypothetical as a binary division between employees and courts, when, in reality, there are other parties—namely, employers. Because a private agent does face a physical impossibility in this scenario, the very standard Nelson is criticizing (the Court's direct conflict test) would produce the very conclusion Nelson believes to be right in this case (preemption of state law). Thus, the public-private agent distinction does not seem to do any work in Nelson's hypothetical. That this distinction escapes Nelson underscores the confusion underlying his test.

²⁶⁶ *See, e.g., Claflin v. Houseman*, 93 U.S. 130, 137 (1876); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340–41 (1816).

*Raich*²⁶⁷ involved a conflict between the Controlled Substances Act (CSA), making the use and possession of all marijuana unlawful,²⁶⁸ and California Proposition 215, making the use and possession of medical marijuana lawful,²⁶⁹ but the Court did not even mention the possibility of the CSA preempting Proposition 215 in its opinion holding that the Commerce Clause authorizes the CSA to apply within California borders to the intrastate manufacture and use of medical marijuana.²⁷⁰ Likewise, conflicting federal and state minimum-wage laws point courts to reach different conclusions in labor disputes, but no one thinks that the federal minimum wage preempts the state minimum wage.²⁷¹ Similarly, federal law forbids a person who uses a controlled substance under the CSA to possess a firearm,²⁷² but that law does not preempt the authority of states to permit such possession.²⁷³ And no one has suggested

²⁶⁷ 545 U.S. 1 (2005).

²⁶⁸ 21 U.S.C. §§ 812(c), 841, 844 (2000).

²⁶⁹ Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2005).

²⁷⁰ *Gonzales*, 545 U.S. at 22. Note that *Raich* is simply the reverse of Nelson's union hypothetical: Whereas in Nelson's hypothetical, federal law permits what state law prohibits (union organizing), in *Raich* federal law prohibited what state law permitted (medical marijuana). But *Raich* was litigated only as an Article I case, raising only the question of whether the federal government had the authority to prosecute the intrastate use and possession of medical marijuana, *id.* at 5, not as a preemption case, which would have raised the question of whether the CSA automatically displaced California's authority to permit medical marijuana. Why did no one think of this as a preemption case? The answer is simple: No subject of these federal and state laws was obligated to perform conflicting actions. Angel Raich, after all, was not obligated under state law to use and possess medical marijuana. For this reason, federal law did not preempt state law. The federal government, to be sure, had the authority to go after Angel Raich under the CSA, as the Court affirmed in its opinion. But California law, in permitting medical marijuana, was not preempted by federal law. Indeed, more than ten years after the decision, the medical marijuana industry in California is flourishing, and similar state laws are permeating through the nation. See *Marijuana Resource Center: State Laws Related to Marijuana*, OFF. NAT'L DRUG CONTROL POL'Y, <https://obamawhitehouse.archives.gov/ondcp/state-laws-related-to-marijuana> [<https://perma.cc/58ZC-CLNX>] (explaining how "23 states and Washington, DC have passed laws allowing smoked marijuana to be used for a variety of medical conditions[,] and how "[v]oters in Alaska, Colorado, Oregon, and Washington state [have] also passed initiatives legalizing the sale and distribution of marijuana for adults").

²⁷¹ Indeed, were an employee to sue an employer in California court for paying her \$9.00, the court would have to choose between applying the federal and state minimum wage laws to resolve the dispute, but there is no conflict imposed on private agents, because an employer that satisfies the federal minimum wage of \$7.25 per hour is not prohibited under any law from exceeding that amount to satisfy the California minimum wage of \$10.00 per hour. See generally *Minimum Wage Laws in the States*, U.S. DEP'T LABOR, WAGE & HOUR DIVISION (Aug. 1, 2016), <http://www.dol.gov/whd/minwage/america.htm> [<https://perma.cc/3MU4-XQLJ>].

²⁷² 18 U.S.C. § 922(g)(3) (2012).

²⁷³ See, e.g., *Willis v. Winters*, 253 P.3d 1058, 1064–66 (Or. 2011) (rejecting the preemption argument). For commentary on the decision's preemption analysis, see Eugene

that a U.S. Supreme Court decision interpreting the Equal Protection Clause²⁷⁴ to permit some forms of affirmative action preempts state bans on all forms of affirmative action,²⁷⁵ or that a U.S. Supreme Court decision interpreting the Establishment Clause²⁷⁶ to permit the government to fund religious schools preempts state bans on such funding.²⁷⁷

All of these cases are like Nelson's hypothetical, in that they involve one sovereign banning something permitted by the other, thereby requiring courts to *choose* between federal and state laws in adjudicating the disputes. And all of these are controversial and widely disputed areas of law, creating appealing preemption scenarios for various shades of the political spectrum. Nevertheless, these federal-state conflicts have generally not been litigated as preemption cases, and when they have, the arguments have been dismissed summarily, with no one raising the argument that there should be preemption due to the fact that the courts would be subject to conflicting commands.²⁷⁸

Now that we have established that individuals rather than courts are the relevant agents of the preemption analysis, we must determine *when* conflicting legal obligations arise from these commands, so as to warrant preemption of state law. To answer this question, we will have to examine some legal philosophy on the status of rights.

2. Rights and Conflicting Obligations

The most important work on the concept of rights is still Wesley Hohfeld's groundbreaking 1913 work, *Some Fundamental Legal Conceptions as Applied in Judicial*

Volokh, *Oregon Medical Marijuana Users Are Entitled to Oregon Licenses to Carry Concealed Guns (Notwithstanding Federal Ban on Gun Possession by Illegal Drug Users)*, VOLOKH CONSPIRACY (May 19, 2011), <http://volokh.com/2011/05/19/oregon-medical-marijuana-users-are-entitled-to-oregon-licenses-to-carry-concealed-guns-notwithstanding-federal-ban-on-gun-possession-by-illegal-drug-users/> [<https://perma.cc/HRA6-JKN9>].

²⁷⁴ U.S. CONST. amend. XIV, § 1.

²⁷⁵ Compare *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that the Equal Protection Clause permitted the University of Michigan Law School's narrowly tailored use of race in admissions decision to further a compelling interest in obtaining the educational benefits that flow from a diverse student body), with *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. ___, 134 S. Ct. 1623 (2014) (holding that the Equal Protection Clause permitted Michigan to ban the type of affirmative action upheld in *Grutter*).

²⁷⁶ U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion[.]").

²⁷⁷ Compare *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (holding Ohio's Pilot Project Scholarship Program does not offend the Establishment Clause), with *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006) (holding that Florida's Opportunity Scholarship Program was impermissible under the state constitution, despite being permissible under the First Amendment's Establishment Clause).

²⁷⁸ See *Reed-Kalisher v. Hoggatt*, 332 P.3d 587, 591–92 (Ariz. Ct. App. 2014); *Qualified Patients Ass'n v. City of Anaheim*, 115 Cal. Rptr. 3d 89, 105–07 (Cal. Ct. App. 2010); *Willis*, 253 P.3d at 1064–66.

Reasoning,²⁷⁹ where Hohfeld explored the relationships among eight legal concepts that he identified as basic to any legal system: (1) right, (2) no-right, (3) privilege, (4) duty, (5) power, (6) disability, (7) immunity, and (8) liability.²⁸⁰ The Hohfeldian framework relates to preemption law in that it shows how rights function as a hybrid of a permission and obligation norm: A right *permits* the right-holder to engage in an action, but the right *obligates* legal subjects who must honor the right-holder's exercise of that right.²⁸¹ By contrast, a privilege is only a permission norm: A privilege creates a permission norm for the privilege-holder to engage in an action, but it carries no obligations for any legal subjects.²⁸²

This is why the agency issue raised above is so important. Under Nelson's test, courts are the agents subject to logical contradictions. As a result, all conflicts between privileges and prohibitions, just like conflicts between rights and prohibitions, would warrant preemption of state law. This is because privileges and rights are identical in obligating courts, as the arbiters rather than the subjects of law, to enforce permission

²⁷⁹ Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

²⁸⁰ *Id.* at 30. Hohfeld separated these concepts into two categories: jural opposites and jural correlatives. *Id.* Jural opposites cannot coexist for the same class of action at the same time; a jural opposite is a negation of a corresponding legal concept. *See id.* By contrast, jural correlatives consist of a pair of legal concepts that must coexist for the same class of action at the same time; a jural correlative refers to a legal concept's corresponding status that must inhere in Party *B* so that it can exist for Party *A*. *Id.* at 32–33. This means that if Party *A* has a right to perform *x* class of action, that right exists if, and only if, Party *B* has a duty to Party *A* with respect to that action. *Id.* at 31–32. This will generally be enforced by a lawsuit against *B* if *B* violates that duty. Alternatively, if Party *A* has a privilege to perform *x* class of action, that privilege exists if, and only if, Party *B* has no right or duty to interfere with Party *A*'s performance of that action. *Id.* at 32. This will often appear in law as an affirmative defense; if *A* is sued by *B* for engaging in *x* class of action, *A* can assert an absolute defense by pointing to his privilege. If Party *A* has a power (i.e., the capacity to create or change a legal relationship), that power exists if, and only if, Party *B* has a liability. *Id.* at 44. For example, courts have power over the legal status of subjects only because courts can enter judgements that render the parties liable. Finally, if Party *A* has an immunity, that immunity exists if, and only if, Party *B* has a disability. *Id.* at 55. For example, the states have sovereign immunity only because courts are disabled from rendering judgments against them.

²⁸¹ *Id.* at 32, 42 n.59.

²⁸² *Id.* at 33. Consider, for example, the difference between property rights and driving licenses. Because I own my car, I can sue for conversion if someone interfered with my access to my car; all private parties have an obligation not to interfere with the exercise of my property rights, which means that only in limited circumstances may they use or enter my property without my consent. By contrast, no private party owes me a duty not to interfere with my driving privileges. The State of Maryland, which issued my driving license, does have a duty not to deprive me of my driving privileges, which means that it may deprive me of my privileges only for certain circumscribed reasons. But no legal subject owes me any duties in not interfering with the exercise of my driving privileges, as opposed to the duty they owe me not to interfere with the exercise of my property rights in my car.

norms. Under my proposed test, however, in which only conflicts of obligations generate logical contradictions within a normative system, and only the subjects of law are the agents for whom federal and state law must be made consistent for preemption purposes, the only type of permission norm that can generate a logical contradiction is a right, not a privilege. This is because rights are the only permission norms that impose obligations on other legal subjects.

This makes it critical, when analyzing whether there is a conflict of obligation arising from a legal provision authorizing some form of conduct, to determine whether we are dealing with a right or privilege. That is, we must determine whether the law only authorizes an action (in which case it is just a privilege, and therefore never warrants preemption) or also imposes obligations on other parties in the process (in which case it is a right, and therefore warrants preemption if it conflicts with other legal obligations). Part IV will illustrate how this will cash out doctrinally by applying my proposed test to various hypothetical and real cases, and in the process highlighting how my test differs from the Supreme Court's direct conflict test, as well as other leading proposals covered in Part II.

IV. DISTINGUISHING AND APPLYING MY PROPOSED NORMATIVE CONSISTENCY TEST

The test developed in this Article can be summarized in the following terms: Federal law displaces state law under the Supremacy Clause if, and only if, the *normative terms* of the two laws impose conflicting *obligations* on the *subjects* of those laws, either through legal *prohibitions*, *requirements*, or *rights*. The only source of information relevant to whether there is such a conflicting obligation is the *content* of the norms themselves. That content may be derived from multiple legal sources; my approach does not adopt a view on statutory interpretation and, therefore, does not necessarily exclude the use of legislative intent or purpose in determining the content of a particular legal enactment. But once the content of a legal provision is ascertained, that normative content is the only relevant information in determining whether preemption is warranted under the Supremacy Clause. As we will see below, this distinguishes my test from the other aforementioned accounts in several important ways.

A. Distinguishing My Normative Consistency Test

My test most obviously differs from Nelson's logical contradiction test. As a matter of nomenclature, I have resisted making my proposal another logical contradiction test, opting instead to call my approach a "normative consistency" test. This may be a bit counterintuitive, given that my test more closely follows formal logic than does Nelson's logical contradiction test. Nevertheless, I have resisted explicitly calling my test a *logical* test because turning the analysis on logical commands unnecessarily raises questions about why, how, and whether the dictates of formal

logic should apply to legal enactments. For example, do non-normative conflicts, such as definitional conflicts between federal and state law, also raise logical contradictions? It would seem so.²⁸³ To avoid getting bogged down in such metaphysical controversies, I have sought to follow how conflicts arise in other areas of positive law, looking to formal logic only after finding the theorem against conflicting obligations expressed in various areas of legal practice and theory.²⁸⁴ The rule proposed in this Article may comport with logic, but it is not commanded by logic. Indeed, my preemption rule is derived from positive law, and although it may ultimately be traceable to logic, it surely is not commanded directly by logic as an independent field of inquiry. For that reason, I have dubbed it a “normative consistency” test, as a test about the relationship between norms, rather than a refinement of Nelson’s logical contradiction test—a test about applying formal logic’s rule of non-contradiction to legal norms.

A more practical distinction between my test and Nelson’s logical contradiction test is that my test looks to preemption as part of a set of consistency doctrines. As a result, my test focuses only on obligations and applies only to legal subjects, whereas Nelson quite differently considers whether dueling federal and state laws require courts to make competing “choices.”²⁸⁵ This has a significant effect on how our approaches would affect preemption doctrine. Accordingly, whereas Nelson’s choice-oriented approach preserves direct conflict, field, and express preemption, my norm-oriented approach preserves only direct conflict preemption, though in a slightly different form.

That raises the question of how my proposed test differs from the Court’s direct conflict preemption analysis. The most important distinction is that my test focuses only on whether the normative content of federal and state laws imposes conflicting obligations on their subjects. The Court has differed in turning this test on the notion of “*impossibility*.”²⁸⁶ As a result, any hypothetical scenario in which it would be *possible* for some individual to comply with the two norms could render the state law not preempted under the Court’s direct conflict analysis. This step of focusing on hypothetical possibilities has divided the Justices,²⁸⁷ making the test, in Professor

²⁸³ Indeed, if federal law defined medical marijuana as a recreational drug and not an actual form of medication, and state law defined it only as a form of medication, that very well may constitute a logical contradiction, since the basic law of identity is that a thing cannot have *x* quality and not have *x* quality. *Cf.* *Gonzales v. Oregon*, 546 U.S. 243, 274–75 (2006) (holding that the Attorney General may not define certain drugs to be prohibited under the Controlled Substances Act for the purpose of preventing doctors from using these drugs in physician-assisted suicide pursuant to state law).

²⁸⁴ It is, to be sure, a fascinating question whether legal practices have tracked this theorem because the dictates of logic guide our conceptions of law. But that is a theoretical question outside the scope of this Article, which I have directed toward the practice, rather than the theory, of law.

²⁸⁵ Nelson, *supra* note 2, at 231–32.

²⁸⁶ *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963); *see also* *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 626 (2011) (Sotomayor, J., dissenting).

²⁸⁷ As Justice Sotomayor argued in dissent, in one of the controversial 5–4 decisions mentioned above, “the mere possibility of impossibility is not enough” to establish preemption

Kendrick's words, "impossible to comply with."²⁸⁸ For this reason, I have assiduously referred to the consistency at the core of preemption as turning not on realms of possibility but rather on the content of norms—it is not a *possibility* consistency but rather a *normative* consistency.

Another important distinction between the Court's direct conflict analysis and my normative consistency test is I have contextualized my test within a broader set of doctrines dealing with legal consistency, thus offering more guidance to courts in ascertaining what constitutes a conflicting obligation. By using church-state law as a guide, for example, we can determine that penalties on conduct can present conflicting obligations.²⁸⁹ Accordingly, if a subject has to choose between a penalty under *X* federal requirement, and a penalty under *Y* state prohibition, that warrants preemption of the state law, because it presents conflicting obligations, even though it would be theoretically *possible* to comply with both laws by simply paying one or both of the penalties.²⁹⁰ Contextualizing preemption against the background of other consistency doctrines helps stabilize and settle some of the difficult questions that arise in all areas of law involving conflicting norms.

My proposal perhaps has the most in common with Gardbaum's approach, to which I am largely indebted for the link between the Supremacy Clause and legal consistency. In essence, my approach simply puts meat on the bones of Gardbaum's claim that impossibility preemption is the only branch of the preemption tree warranted by the Supremacy Clause.²⁹¹ Another way to look at how this Article relates to Gardbaum's scholarship is that they are the converse of one another: Whereas Gardbaum considers the precise contours of the direct conflict test to be outside the scope of his project,²⁹² I have made that the centerpiece of my work; and whereas Gardbaum directly takes on the question of whether the other branches of the preemption tree could and should be justified under other constitutional provisions besides the Supremacy Clause,²⁹³ that is a question I leave for another day, though I can say that I am tentatively more drawn than Gardbaum to the notion that substantial parts of the preemption tree, though perhaps not in their entirety, can be justified under the Necessary and Proper Clause.

That leaves the final, and most important, question: How would these distinctions play out in actual cases? In most cases, my normative consistency test, the

under the direct conflict analysis. *PLIVA, Inc.*, 564 U.S. at 635 (Sotomayor, J., dissenting). According to Justice Sotomayor, this test warrants preemption if, and only if, it would be impossible under every imaginable scenario to comply with both federal and state law at the same time. *Id.* at 634–37.

²⁸⁸ Kendrick, *Impossibility Preemption*, *supra* note 198.

²⁸⁹ See *supra* Section III.B.1.

²⁹⁰ See *supra* notes 219–23 and accompanying text.

²⁹¹ Gardbaum, *Congress's Power*, *supra* note 14, at 44–48.

²⁹² *Id.* at 61 n.95.

²⁹³ Gardbaum, *Nature of Preemption*, *supra* note 14, at 777–85 (discussing the Commerce and Necessary and Proper Clauses).

Court's impossibility, and Nelson's logical contradiction test will reach the same results. But this will not always be the case. To illustrate where these approaches will direct courts to reach different results, let us return to some of the examples we have considered throughout this Article.

B. Applying My Normative Consistency Test

Let us reconsider Nelson's union hypothetical involving a federal "right to join a labor union" and a state prohibition on labor unions.²⁹⁴ Nelson does not seem to be referring to a mere privilege to join a labor union but rather an affirmative right. This distinction is significant because, as explained above, a privilege would not impose any obligations on third parties, but a right would obligate employers not to enforce any legal prohibitions on the exercise of that right. Only if Nelson's union hypothetical involves a federal right, and not a federal privilege, does it involve a conflict of obligations on legal subjects, with employers required under federal law to do what they are prohibited from doing under state law, thereby giving rise to an actual logical contradiction. Thus, if Nelson is referring to a right here, he is on firm footing in finding a conflict of obligations on legal subjects, thus warranting preemption of state law.

In the next paragraph, however, Nelson loses this footing, obscuring the critical logical distinction between rights and privileges by stating the following rule:

If state law purports to authorize something that federal law forbids or to penalize something that federal law gives people an unqualified right to do, then courts would have to choose between applying the federal rule and applying the state rule, and the Supremacy Clause requires them to apply the federal rule.²⁹⁵

Half of this statement is right: If state law *penalizes* something that federal law gives people an unqualified right to do, then there is a logical contradiction, because the state penalty would function as a prohibition norm forbidding anyone to participate in that action, and the federal right would function as a right requiring some party to effectuate the exercise of that right, thereby imposing a conflict of obligations on that party.²⁹⁶ The other half, however, is not right: If a state law merely authorizes something that federal law forbids, then there would be no logical contradiction because the state law, in authorizing the action, would create only a privilege and not require anything of another legal subject.

Consider the *Wyeth* case, raising the question of whether the FDA's approval of a drug label preempted a lawsuit under state law against the brand-name manufacturer for failing to provide an adequate warning of the drug's risks.²⁹⁷ The Court, per

²⁹⁴ Nelson, *supra* note 2, at 261.

²⁹⁵ *Id.*

²⁹⁶ *Cf.* *Sherbert v. Verner*, 374 U.S. 398, 410 (1963).

²⁹⁷ *Wyeth v. Levine*, 555 U.S. 555, 558–59 (2009).

Justice Stevens, ruled that the conflict between the FDA's authorization of the label, and the state's damages award on the basis of that label, did not create an impossibility conflict because a manufacturer could theoretically comply with the FDA label while adding to that requirement in light of state jury determinations.²⁹⁸ This reasoning is wholly consistent with the Court's impossibility jurisprudence because the drug manufacturer was not subject to a physical impossibility in being subject to the FDA labeling requirements and the stronger state standard.

Would the state law be preempted, however, under my normative consistency test? No, but for slightly different reasons. First, we would want to determine what type of norm applied to the manufacturer under the FDA's approval of the label. The FDA's authorization seems to create a privilege and not a right because while it grants the drug manufacturer the authority to sell the drug with the approved label, it does not appear to impose any obligations on any other parties in the process.²⁹⁹ Second, we would want to determine what type of norm applied to the manufacturer under the state jury award. Here, we would not be operating in a legal vacuum. We know from other consistency doctrines that monetary penalties on conduct constitute prohibitions on that conduct, so as to create inconsistencies if a countervailing norm requires the performance of that conduct.³⁰⁰ We therefore have a state obligation but no countervailing federal obligation. And as a result, there was no conflict of obligations imposed on Wyeth, and the Court was right in not preempting the state jury award.

Under Nelson's test, however, the Court should have found preemption here. Because Nelson does not distinguish between rights and privileges, and because he focuses on courts as the agents of preemption analysis, the FDA's label-approval created precisely the conflict on courts that Nelson's logical contradiction test prohibits.

Betraying the confusion underlying Nelson's test, however, Justice Thomas applied Nelson's logical contradiction test to *concur* with the majority that there was no preemption here, despite the fact that Nelson's test seemed to require the opposite result.³⁰¹ Indeed, reiterating Nelson's argument almost verbatim, Justice Thomas disagreed with the Court's impossibility standard for direct conflicts, explaining that "[t]here could be instances where it is not 'physically impossible' to comply with both state and federal law, even when the state and federal laws give directly conflicting commands."³⁰² Justice Thomas then offered an example, modeled after Nelson's union hypothetical: "[I]f federal law gives an individual the right to engage in certain

²⁹⁸ *Id.* at 581. Under the FDA's "changes being effected" regulation, federal law permitted the drug manufacturer to change the label to account for the risk at issue in this case. *Id.* at 568 (citing 21 C.F.R. § 314.70(c)(6)(iii)(A), (C)).

²⁹⁹ *Id.* at 568.

³⁰⁰ Indeed, just as a state jury award for participating in a religious ritual would constitute a prohibition on that ritual, thereby satisfying the substantial burden test if the ritual were commanded by the challenger's religion, the same is the case for a drug manufacturer facing state jury damages awards for conduct required by federal law.

³⁰¹ *Wyeth*, 555 U.S. at 582, 590 (Thomas, J., concurring in the judgment).

³⁰² *Id.* at 590 (citing Nelson, *supra* note 2, at 260–61).

behavior that state law prohibits, the laws would give contradictory commands notwithstanding the fact that an individual could comply with both by electing to refrain from the covered behavior.”³⁰³ Instead of engaging this analysis, which would seem to mean that the FDA law preempted the state jury award because the federal law authorized Wyeth to do what the state jury sought to prohibit it from doing, Justice Thomas glibly concluded that he concurred with the majority that there is no preemption here because “[t]he text of the federal laws at issue do not require that the state-court judgment at issue be pre-empted, under either the [Court’s] narrow ‘physical impossibility’ standard, or [Nelson’s] more general ‘direc[t] conflict’ standard.”³⁰⁴

Contrast this with Justice Thomas’s analysis in *PLIVA, Inc. v. Mensing*,³⁰⁵ which involved the related, but distinct, question of whether a state court can issue a damages award against a *generic* drug manufacturer for failing to provide sufficient warnings on a prescription drug label.³⁰⁶ That the defendants in *PLIVA, Inc.* were generic manufacturers was significant because, under FDA regulations, generic drugs are required to match the label of the brand-name equivalent.³⁰⁷ The *PLIVA, Inc.* case therefore raised the question whether the state jury award, in penalizing the generic manufacturers, and the FDA regulations, in requiring that the generic and brand-name labels be equivalent, imposed conflicting obligations.³⁰⁸ In an opinion written by Justice Thomas, the Court found that because the state jury award functioned as a *prohibition* on using the label, and the FDA rule functioned as a *requirement* on using that same label, the manufacturers were indeed facing a conflict of obligations, and therefore preemption of such state tort actions was warranted.³⁰⁹

Whereas in *Wyeth* Justice Thomas glibly recited Nelson’s logical contradiction test to derive a shallow explanation for why there was no preemption,³¹⁰ Justice Thomas presented a very powerful opinion in *PLIVA, Inc.* for why there was preemption here, and in making this argument, he did not rest his reasoning solely on Nelson’s test, though he did mention the test in various places.³¹¹ Instead, Justice Thomas began the *PLIVA, Inc.* analysis exactly as prescribed under my proposed normative consistency test: “Pre-emption analysis requires us to compare federal and state law. We therefore begin by identifying the state tort duties and federal labeling requirements applicable to the Manufacturers.”³¹² Notice that the question here was not whether the *Court* was facing conflicting commands, as Nelson’s test prescribes, but rather whether the *manufacturers*, the subjects of the applicable federal and state

³⁰³ *Id.* (citing Nelson, *supra* note 2, at 260–61).

³⁰⁴ *Id.* at 591 (internal citations omitted).

³⁰⁵ 564 U.S. 604 (2011).

³⁰⁶ *Id.* at 608–09.

³⁰⁷ *Id.* at 614.

³⁰⁸ *See id.* at 609.

³⁰⁹ *Id.* at 618.

³¹⁰ *See supra* notes 301–04 and accompanying text.

³¹¹ *See, e.g., PLIVA, Inc.*, 564 U.S. at 621–22 (opinion of Thomas, J.).

³¹² *Id.* at 611 (majority opinion).

laws, were facing such a conflict.³¹³ Also notice that Justice Thomas focused his analysis on the *content of the norms*, with an emphasis on the fact that they imposed *conflicting obligations*—i.e., *duties* and *requirements*.³¹⁴ This is exactly what my proposed test calls for, and it represents an important departure from both the logical contradiction test and the impossibility analysis. While there is certainly room for debate as a matter of FDA law as to whether Justice Thomas was right that the FDA rule actually imposes this requirement on generic manufacturers, the *form* of Justice Thomas's analysis is precisely right under my normative consistency test, as opposed to his much less precise use of Nelson's logical contradiction test in *Wyeth*. Indeed, one can see in *PLIVA, Inc.* the advantages of my normative consistency test over both the Court's impossibility analysis and Nelson's logical contradiction test. Whereas the Court's impossibility test always leaves open the possibility of not finding preemption based on theoretical possibilities,³¹⁵ and the logical contradiction test would treat *Wyeth* and *PLIVA, Inc.* as the same scenario,³¹⁶ my normative consistency test, by focusing only on the *norms* themselves and using settled rules *derived from other consistency doctrines* as to when norms create conflicting obligations so as to warrant displacement, is the only test with rules *deeply rooted in our legal system* and capable of producing the predictable decision-making so essential to transcending the political divisions pervading preemption jurisprudence.

CONCLUSION

"Consistency," Kant wrote, "is the highest obligation of a philosopher, and yet the most rarely found."³¹⁷ That also may be said of law. Consistency is surely one of the most important elements of the rule of law, but it also may be one of the most difficult features to secure in an actual legal system. Indeed, Hart was right in worrying that, because of the specter of legal inconsistency, there is always the threat of a "nervous breakdown"³¹⁸ underlying the law.

In this Article, I have tried to show how preemption, which is generally thought of as a rather straightforward federalism doctrine, is in fact much more than that. It

³¹³ See *id.* at 609.

³¹⁴ See *id.* at 623 (opinion of Thomas, J.).

³¹⁵ After all, as the dissent pointed out, the generic manufacturers could have simply paid the state jury award and continued using the label, or they could have simply exited the market in certain states. *Id.* at 643–45 (Sotomayor, J., dissenting). This is why no case before *PLIVA, Inc.* had found preemption based on the impossibility branch, and even in *PLIVA, Inc.*, this outcome was not warranted by the doctrine. *Id.* at 639–40.

³¹⁶ This is because in both scenarios courts faced competing laws. Indeed, the logical contradiction test cannot account for why the Court, as well as Justice Thomas in applying the test, reached discrepant outcomes in these cases.

³¹⁷ IMMANUEL KANT, *Critique of Practical Reason*, in KANT'S CRITIQUE OF PRACTICAL REASON AND OTHER WORKS ON THE THEORY OF ETHICS 123, 155 (Thomas Kingsmill Abbott trans., Longman, Green & Co. 2d ed., 1879).

³¹⁸ Hart, Jr., *supra* note 24, at 489.

is a consistency doctrine, one of many ways that our legal system seeks to ensure a unity of law. As demonstrated in Part I, preemption doctrine cannot be based on competing and incompatible theories of what it means for laws to be consistent with one another, for such doctrinal incoherence will produce the preemption politics currently pervading our jurisprudence. Indeed, I hope that Section I.B.5 has left the reader with the indelible impression that, at least as far as its preemption jurisprudence is concerned, the Roberts Court has been experiencing, and has been generating, precisely the nervous breakdown that so worried Hart.

In reviewing the various solutions to this problem in Part II, this Article has sought to illustrate why a formalist approach, though certainly not well-suited for all legal problems, is particularly well-suited for this one. When a legal problem is a formal one, the solution should be as well. And the problem that preemption is designed to address—that of making federal and state law consistent—is a thoroughly formal one. Professor Meltzer's point is well taken that our polity is too complicated for simple formal preemption rules,³¹⁹ but he overlooked the even more serious problem that the judiciary is not well-suited to addressing this problem with simple functional standards. We have seen what has resulted when courts have sought to use functionalist solutions to focus on making legal purposes cohere together, as opposed to the more appropriate juridical task of making legal norms consistent with one another. All sides of the political spectrum have suffered as a result of the incoherence. Plaintiffs have been denied rightful remedies, businesses have operated in unpredictable legal environments, and most importantly for constitutional purposes, states have been arbitrarily deprived of their regulatory authority.

As explained in Parts III and IV, this formal consistency is required not because logic commands a particular form of legal consistency, but because that is how our system of law deals with consistency issues in practice. Normative consistency may track logic, but the theory of normative consistency advanced in this Article is commanded by deep values underlying our entire legal system, not any rule of formal logic. This recalls Voltaire's quip: "If God did not exist, it would be necessary to invent him."³²⁰ If the Supremacy Clause did not exist, and legal consistency were not textually required by any particular constitutional provision, it would be necessary to invent this requirement, for it is an essential element of the rule of law. Whether this rule-of-law requirement ultimately resides in metaphysical truths or our own legal constructions, the most pressing point for purposes of this Article is that a normative consistency is positively embedded within our concept of preemption.

³¹⁹ Meltzer, *supra* note 17, at 7.

³²⁰ *If God Did Not Exist, It Would Be Necessary to Invent Him*, VOLTAIRE SOC'Y AM., <http://www.whitman.edu/VSA/trois.imposteurs.html> [<https://perma.cc/L53M-49AZ>].

APPENDIX A

1. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71 (2006)
2. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007)
3. *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008)
4. *Preston v. Ferrer*, 552 U.S. 346 (2008)
5. *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008)
6. *Chamber of Commerce of the U.S. v. Brown*, 554 U.S. 60 (2008)
7. *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008)
8. *Wyeth v. Levine*, 555 U.S. 555 (2009)
9. *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519 (2009)
10. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011)
11. *Williamson v. Mazda Motor of America, Inc.*, 562 U.S. 323 (2011)
12. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)
13. *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582 (2011)
14. *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011)
15. *National Meat Ass'n v. Harris*, 565 U.S. 452 (2012)
16. *Kurns v. Railroad Friction Products Corp.*, 565 U.S. 625 (2012)
17. *Arizona v. United States*, 567 U.S. ___, 132 S. Ct. 2492 (2012)
18. *Wos v. E.M.A.*, 568 U.S. ___, 133 S. Ct. 1391 (2013)
19. *Hillman v. Maretta*, 569 U.S. ___, 133 S. Ct. 1943 (2013)
20. *American Trucking Ass'ns v. City of Los Angeles*, 569 U.S. ___, 133 S. Ct. 2096 (2013)
21. *Tarrant Regional Water District v. Herrmann*, 569 U.S. ___, 133 S. Ct. 2120 (2013)
22. *Dan's City Used Cars v. Pelkey*, 569 U.S. ___, 133 S. Ct. 1769 (2013)
23. *Mutual Pharmaceutical Co. v. Bartlett*, 570 U.S. ___, 133 S. Ct. 2466 (2013)
24. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. ___, 133 S. Ct. 2247 (2013)
25. *Northwest, Inc. v. Ginsberg*, 572 U.S. ___, 134 S. Ct. 1422 (2014)
26. *CTS Corp. v. Waldburger*, 573 U.S. ___, 134 S. Ct. 2175 (2014)
27. *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. ___, 135 S. Ct. 1591 (2015)
28. *Gobeille v. Liberty Mutual Insurance Co.*, 577 U.S. ___, 136 S. Ct. 936 (2016)